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VIA FEDERAL EXPRESS

Mr. Branden Blum
Senior Counselor
c/o Office of Assistant General Counsel for Ocean Services
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1305 East-West Highway
Room 6111, SSMC-4
Silver Spring, MD 20910

RE: Islander East's Reply to the Connecticut Department of Environmental Protection's Initial Brief in Opposition to the Appeal from a Coastal Zone Management Plan Objection

Dear Mr. Blum:

On behalf of the Islander East Pipeline Company, L.L.C., enclosed please find an original and two copies of Islander East's Reply to the Connecticut Department of Environmental Protection's ("CTDEP") Initial Brief and an original and two copies of the volumes of Exhibits to the subject appeal. Also enclosed is an additional copy of the Reply to the CTDEP's Initial Brief and the Exhibits on CD-ROM. These documents are being served on the Office of the Attorney General for the State of Connecticut. Thank you.

Very truly yours,

Frank L. Amoroso
Nixon Peabody
Attorneys for Islander East Pipeline Company, L.L.C.

FLA:mm

cc: Islander East Pipeline Company, L.L.C. (Via Federal Express)
David Wrinn, Esq., Connecticut Attorney General's Office (Via Federal Express)

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Islander East Pipeline Company, L.L.C.)
)
Appellant,)
)
– against –)
)
State of Connecticut Department of)
Environmental Protection,)
)
Respondent.)

REPLY TO THE CTDEP'S INITIAL BRIEF IN OPPOSITION

Respectfully submitted,

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PART ONE
PRELIMINARY STATEMENT

Connecticut's latest submission demonstrates the lengths to which it will go to press its parochial interests over those of other states and the nation as a whole. This is the same state that has, for the past two years, blocked the operation of the Cross Sound Cable, an electric transmission line across Long Island Sound, because 1430 feet of the 24 mile cable are buried at less than the required depth. Even after the massive blackout that struck the Northeastern and Midwestern United States and parts of Canada on August 14, 2003, and after Secretary Abraham's orders finding that operation of the cable is necessary to alleviate emergency conditions and support electric transmission systems in New England,¹ Connecticut continues to oppose operation of the cable. It has even sued Secretary Abraham,² calling his action a "dictatorial edict" that will enable "operation of an illegally located cable that endangers Connecticut's environment, consumers and economy" – all on the basis of the 1430 feet of "illegal" cable,³ and despite findings by both the Corps of Engineers and its own state agencies that the cable can be safely operated at its current burial depth.⁴

Here, Connecticut is again pressing its parochial interests to block a critical interstate energy project by minimizing the proven need for the Project, grossly overstating the impact of the Project on the environment in a conclusory manner, and asserting positions on key issues that have no basis in fact or law. This brief responds to the serious distortions of fact and misstatements of law in CTDEP's⁵ brief ("CTDEP Brief")⁶ and reiterates Islander East's position

¹ Department of Energy Order No. 202-03-2 (Aug. 28, 2003).

See Blumenthal v. Abraham, Second Circuit Docket No. 03-40609, Petition for Review dated September 22, 2003.

Press Release of Connecticut Attorney General's Office (Sept. 22, 2003). Even the Commissioner of the CTDEP expressed his concern that "published rhetoric has eclipsed facts on this project, at least from an environmental impact standpoint." Letter from Arthur J. Rocque, Commissioner, CTDEP, to Richard Blumenthal, Attorney General of Connecticut, dated June 13, 2002.

⁴ Letter from Charles H. Evans, Director, Office of Long Island Sound Programs, CTDEP, to James P. Nash, Project Director, Cross Sound Cable Company, dated January 6, 2003; Letter from Charles H. Evans, Director, Office of Long Island Sound Programs, CTDEP, to James P. Nash, Project Director, Cross Sound Cable Company, dated December 23, 2002, at 3; Letter from Thomas L. Koning, Colonel, Corps of Engineers, District Engineer, Department of the Army, to Cross Sound Cable Company, Attn: James P. Nash, dated December 30, 2002.

Capitalized terms not defined herein have the meaning assigned to them in Islander East's Initial and Supplemental Memoranda. See note 7 *infra*.

that the Secretary should override CTDEP's denial of Islander East's request for a consistency determination.⁷ As demonstrated in Islander East's prior briefs and herein, the Project is consistent with the objectives of the CZMA (Ground I), *i.e.*, the Project furthers the national interest in a significant or substantial manner; the national interest furthered by the Project outweighs any adverse coastal effects that may result from the Project; and there is no reasonable, available alternative that would permit the Project to achieve its primary purpose of providing a separate independent pipeline crossing of Long Island Sound. In addition, the Project is necessary in the interest of national security (Ground II). In this appeal, the Secretary must decide on a *de novo* basis only whether the Project satisfies these standards.⁸

ARGUMENT

I. THERE IS NO MERIT TO CTDEP'S CLAIM THAT THE PROJECT IS UNNEEDED AND WILL NOT SIGNIFICANTLY FURTHER THE NATIONAL INTEREST.

As Islander East has demonstrated, the Project furthers the national interest in a significant and substantial way. The Project promotes at least four national interest objectives set forth in the CZMA: (i) it is a "major facilit[y] related to . . . energy" which is entitled to "priority consideration" under the statute; (ii) it promotes the "national objective in achieving a greater degree of energy self-sufficiency"; (iii) it is consistent with "compatible economic

Opening Brief of the State of Connecticut Department of Environmental Protection, dated October 6, 2003.

A more detailed response to specific environmental matters raised in the CTDEP Brief is set forth in the Technical Comments included *infra*, Part Two. Islander East filed two previous memoranda of law in this proceeding: (1) on February 10, 2003, the Initial Memorandum Of Law Of Islander East Pipeline Company, L.L.C. On Appeal From A Coastal Zone Management Plan Objection of the State of Connecticut, Department of Environmental Protection To The Islander East Pipeline Project ("Initial Memorandum"), and (2) on August 20, 2003, the Supplemental Memorandum of Law Of Islander East Pipeline Company, L.L.C. On Appeal From A Coastal Zone Management Plan Objection Of The State of Connecticut Department of Environmental Protection To A Consistency Certification For The Islander East Pipeline Project ("Supplemental Memorandum"). In addition, with these memoranda, Islander East submitted Exhibit Binders 1-5. Many of the documents referenced in this brief are contained in Islander East's Exhibit Binders 1-5 and CTDEP's Exhibits, Volumes 1-2. Additional documents are contained in Exhibit Binder 6 submitted herewith.

Because of the limited nature of the Secretary's review, many of the issues raised by CTDEP in its brief and the speakers at the public hearing – *e.g.*, safety, cultural resources, Iroquois capacity, inland wetlands, proximity to a school, and others – are beyond the scope of this proceeding; are not further addressed herein; and need not be addressed by the Secretary in deciding this appeal. They have, however, been fully addressed by FERC and other appropriate authorities.

development” in the coastal zone; and (iv) by providing clean-burning natural gas as an alternative to other fuels, it will further the national policy to protect and develop the resources of the coastal zone.⁹

CTDEP goes to extraordinary and inappropriate lengths to minimize the importance of the Project, asserting that it will not “supply any natural gas that is indisputably needed to meet the region’s energy requirements.” (CTDEP Brief at 37). Its unfounded arguments are contrary to the findings of FERC, the (only) federal agency charged with determining project need. As FERC Chairman Wood recently and definitively reiterated to NOAA, “the Islander East project is required to meet the growing demand for natural gas in the eastern Long Island area.”¹⁰

CTDEP’s sole support for its position on need is a letter written by Phillip Sussler. (CTDEP Brief at 10-11). Mr. Sussler’s qualifications aside,¹¹ the overwhelming weight of the evidence supports the need for Islander East and the gas it will deliver. Mr. Sussler’s letter flies in the face of the conclusions reached by FERC, the NYSPSC – the agency that regulates the New York utilities which have contracted for long term capacity on Islander East – the utilities themselves, and Islander East’s other customers. Mr. Sussler’s conclusion that the KeySpan distribution companies’ long-term commitment to the Project is “unreliable” is specious and reckless. The KeySpan distribution companies are regulated utilities with statutory public service obligations, who have represented to their state regulators, to FERC and to the Secretary that they have contracted for service on Islander East because they need the supplies to be transported on the Project to serve firm heating load.¹² Mr. Sussler’s personal speculation to the contrary should be disregarded.

See Initial Memorandum at 29-38; Supplemental Memorandum at 12-13.

¹⁰ Letter from Patrick Wood III, Chairman, FERC, to Scott Gudes, Deputy Undersecretary for Oceans and Atmosphere, Department of Commerce, dated October 20, 2003.

Mr. Sussler is a lawyer who has been retained by the Connecticut Attorney General in various proceedings; he has no credentials as an expert. Despite diligent search and despite Mr. Sussler’s professed expertise on markets for natural gas in the U.S. Northeast, Islander East has been unable to find a single article written by Mr. Sussler on any subject, and the only public record found of his use as an “expert” is in a Connecticut Resource Recovery Authority proceeding, where Mr. Sussler was apparently retained by Attorney General Blumenthal. Despite Mr. Sussler’s professed expertise on markets for natural gas in the U.S. Northeast, no one at Islander East or at any of the companies involved in the Islander East Project (including Duke Energy and KeySpan) has ever heard of Mr. Sussler.

Letter from Ronald G. Lukas, Vice President Trading Services, LLC, KeySpan, to Office of General Counsel for Ocean Services, NOAA, dated September 30, 2003.

Likewise, CTDEP's assertion that there are other pipeline projects that could serve the markets to be served by Islander East (CTDEP Brief at 2-3) is simply inaccurate. While there were once a number of proposals to serve various New York markets, Islander East is now the only proposal to deliver incremental supplies to Eastern Long Island. Iroquois' ELI project, which has sometimes been described as an alternative to Islander East – although it would not have served Islander East's purpose of providing needed gas supplies via an independent delivery system – has been withdrawn. Another proposal – the Millennium project – would have served only New York City, not Long Island, and, based on the Secretary's December 12, 2003 Decision, is in any event no longer an alternative as proposed and currently permitted by FERC. The only other proposal extant – the Eastchester Expansion of Iroquois' system – is under construction, will serve load incremental to that of the Islander East shippers, serves Westchester County and New York City, not Long Island, and could not deliver gas to Islander East's market.¹³

CTDEP's similar argument that the Islander East Project is “but one of several designed to transfer natural gas supplies from one area of the northeast to another” is another example of its attempts to mislead reviewers of the Project. (CTDEP Brief at 35-36). The Islander East Project will deliver new, incremental gas supplies under long term agreements for incremental capacity to markets in the region – it will not “transfer” existing gas supply from one state to another.

CTDEP's argument that the Project will not promote energy self-sufficiency, but will instead make the United States more dependent on foreign (*i.e.*, Canadian) sources of gas (CTDEP Brief at 33-34), is without merit and demonstrates a lack of expertise in energy supply issues. In the context of national energy policy, Canada is not a “foreign” country. The United States and Canada have executed a free trade agreement requiring national treatment for trade in

¹³ For this reason, Mr. Sussler's observation (CTDEP Brief at 11) that Islander East's market study “does not analyze the ability of increases in gas pipeline delivery infrastructure planned or under construction for the greater New York City metropolitan area” to displace the need for the Project is irrelevant. Islander East's market study was designed to analyze the area it proposes to serve, not to take into account additional infrastructure in areas it does not. As noted in prior submissions, pipelines serving markets to the west of Long Island are not capable of serving eastern Long Island. However, the opposite is not true: Islander East can backfeed the pipeline systems serving, *e.g.*, the New York City market. That fact is one predicate for Islander East's position, and FERC's conclusion, that Islander East increases the security and reliability of the region's energy infrastructure.

natural gas,¹⁴ and a treaty assuring the reliability of Canadian energy supplies.¹⁵ Congress has provided that the importation of gas from countries with such agreements “shall be deemed consistent with the public interest.”¹⁶ Thus, it is improper to treat Canada as an insecure foreign source of energy. It demeans the close ties between the United States and Canada, ignoring that Canada is a friend and ally, whose borders are contiguous and whose energy infrastructure is highly interconnected with ours. It is but another example of CTDEP’s parochial perspective that is used to legitimize its opposition to the Project. Contrary to CTDEP’s assertion, Islander East will, as the Department of Energy has specifically found, promote energy self-sufficiency, and that is a major factor in its significant contribution to the national interest.¹⁷

Although it bristles at Islander East’s suggestion that it has “substantially misuse[d]” data in support of its positions before the Secretary (CTDEP Brief at 55, n.46), CTDEP’s claim that 89 percent of New England’s gas comes from Canada and the remainder from LNG (CTDEP Brief at 33) is an excellent example of such misuse. The source cited by CTDEP (CTDEP Brief at 34 & n.27) is the Task Force Report.¹⁸ The section of the Report cited by CTDEP states that:

Gas supplies for New England originate from Western Canada (27%), the U.S. producing fields in the Gulf Coast and mid-continent (43%) and, since 1999, Sable Island off the coast of Nova Scotia (11%). The remaining 11% of the region’s gas supplies are imported liquefied natural gas (LNG) delivered to the LNG terminal at Everett, Massachusetts, primarily from Trinidad and Algeria.

CTDEP also incorrectly asserts that Islander East claims that the Project will have “a cause-and-effect relationship to the conversion of oil burning electric generation facilities to gas-fired plants.” (CTDEP Brief at 9). Islander East will provide natural gas for the construction of **new** natural gas fired electric generation capacity in an area which (a) needs new capacity and

¹⁴ North America Free Trade Agreement, Dec. 17, 1992, pt 2, art. 301, U.S. - Can.- Mex.; *see also* General Agreement on Tariffs and Trade, Oct. 30, 1947, art.3(2), 4 Bevans 639, 1947 U.S.T. Lexis 479.

¹⁵ Agreement Concerning Transit Pipelines, Jan. 28, 1977, U.S.-Can., 28 U.S.T. 7449.

¹⁶ Section 3 of the Natural Gas Act, 15 U.S.C. §717b.

¹⁷ Letter from Carl M. Smith, Assistant Secretary, Office of Fossil Energy, to Branden Blum, NOAA, Department of Commerce, dated May 16, 2003.

¹⁸ Task Force on Long Island Sound, Comprehensive Assessment and Report, Part II, Environmental Resources and Energy Infrastructure of Long Island Sound, Sec. 2.4 at 62 (June 3, 2003).

(b) cannot construct oil fired capacity for environmental reasons. As the New York Siting Board concluded when authorizing construction of ANP Brookhaven's new generating facility in Yaphank, New York, which will be served by Islander East, failure to timely approve the project would "delay the environmental and public interest benefits of adding this state-of-the-art, natural gas fuel power plant to the Long Island Power grid at a time of projected capacity shortfalls."¹⁹ New gas-fired capacity is needed to address the issues raised so prominently by the recent blackout, to wit, an inability to sustain service to Long Island when system failures occur in other parts of the country. Even Connecticut's Attorney General acknowledged, on the day after the blackout, that Long Island needs additional generating capacity.²⁰

The absurdity of CTDEP's position on need is perhaps best illustrated by its argument that "Rising natural gas prices are likely to remain a fixture on the energy landscape for some time to come, which would inevitably have a limiting impact upon the potential natural gas markets that companies like Islander East would like to exploit, depressing the market for expansion . . ." (CTDEP Brief at 11). In other words, building Islander East will increase demand for gas which will increase prices which will reduce demand and eliminate the need for Islander East. The argument is preposterous: high prices are caused in part by the inability to access new supplies and deliver them to market. Islander East will add incremental capacity to the market, lowering prices and encouraging competition, and thus is a solution to that problem, not a cause. Just as importantly, the Islander East Pipeline Project is being built on the strength of long term firm contracts with customers who have already committed to expansion volumes. Building Islander East is not going to make that demand disappear.

CTDEP also attempts to undermine the fact that Islander East is entitled to priority consideration under the CZMA because it involves the siting of a major energy facility, arguing that, "[i]n Islander East's case, no 'facility' is 'sited.'" (CTDEP Brief at 24-25). This too is preposterous. That a pipeline can be sited in a number of locations (which CTDEP describes as

¹⁹ Letter dated September 16, 2002 from Brookhaven Energy Limited Partnership to FERC.

²⁰ See Press Release of Connecticut Attorney General's Office (August 15, 2003). CTDEP attempts to minimize the significance of the blackout. The fact is that 52 million people were affected, and, regardless of the cause, the blackout clearly highlights the need for additional generating capacity, particularly in load pockets like Long Island and Southwestern Connecticut that currently import a substantial portion of their electricity supply.

“utterly variable” (CTDEP Brief at 25))²¹ does not mean it is not a “sited” facility. Islander East is clearly entitled to “priority consideration” as a crucial natural gas infrastructure facility. CTDEP’s notion that a petroleum docking facility is entitled to priority treatment, but a (buried) pipeline is not (CTDEP Brief at 25), is fanciful.

Similarly, CTDEP’s effort to avoid the provisions of the CZMA relating to coastal dependent uses by arguing that a pipeline serving an island is not inherently coastal-dependent is without merit. (CTDEP Brief at 25-26). It asserts that Long Island’s status as an island is “irrelevant,” but never explains why that is so. Its statement that where the “pipeline enters the water is utterly variable” does not counter the fact that a pipeline serving Long Island **must enter and exit the water somewhere**, and therefore meets the CZMA criterion for a “coastal dependent” use.²²

In short, there is no merit to any of CTDEP’s attempts to minimize the need for the Project. Its argument that “[a]ll that Islander East has to support its contention that the proposed project will be beneficial for the coastal region is the FERC’s order approving the pipeline route” (CTDEP Brief at 38), blindly minimizes the obvious significance of the findings and orders of FERC, the agency specifically charged under the Natural Gas Act with assessing the public convenience and necessity for pipeline projects. It also completely ignores the actions and determinations of the U.S. Department of Energy, the state of New York, the support of the market and the New York Public Service Commission.²³ As FERC, the Department of Energy and New York have found, and as Islander East thoroughly demonstrated in its Initial and Supplemental Memoranda, Islander East furthers the national interest in a significant and substantial way.

Obviously, the siting of a pipeline is not utterly variable; a pipeline must be sited to interconnect with upstream and downstream facilities. Moving the water-based portion of a pipeline route necessarily requires rerouting the land-based portion, which may lead to additional and substantial land and property impacts, a fact which CTDEP simply ignores.

²² CTDEP’s attempt to distinguish the Tilcon facility is specious. (CTDEP Brief at 19). Tilcon’s transportation of aggregate (like transportation of gas) is not in and of itself water-dependent. Transportation of aggregate by barge to an island (like transportation of gas by pipeline to an island) is water-dependent. Tilcon also transports aggregate by rail; it transports aggregate by barge because that mode of transport is the most economical option for transporting goods to its Long Island customers. Islander East can only transport natural gas to its customers on Long Island via a pipeline which crosses Long Island Sound.

²³ Public Service Commission of the State of New York, Comments on the Draft Environmental Impact Statement, Docket No. CP01-384-000 *et al.*, May 17, 2002.

II. CTDEP HAS FAILED TO UNDERMINE ISLANDER EAST'S COMPELLING SHOWING THAT THE NATIONAL INTEREST IN THE PROJECT OUTWEIGHS ANY ADVERSE ENVIRONMENTAL IMPACTS.

In determining whether the national interest furthered by an activity outweighs the activity's adverse coastal effects in a typical appeal, the Secretary would balance the national interests furthered by the activity against the adverse impacts to coastal resources as determined by the state. Here, CTDEP has sought to embellish its denial with a series of inaccurate, grossly exaggerated and misleading assertions, thereby drawing into the scope of this proceeding the validity of the alleged bases for its denial. It is critical that the Secretary recognize the inaccuracies in CTDEP's assertions, so that when the Secretary conducts the balancing required to determine whether the Project is in the national interest, he will have an accurate depiction of the actual coastal effects of the Project.

CTDEP attempts to elevate the CZMA and the state's CMP to a level separate and apart from the coastal resources. In contrast, FERC's review focuses on a broad panoply of environmental and other issues. The CZMA includes an override provision to deal with precisely the situation here – to assure that coastal considerations are not used to block projects that are environmentally acceptable and will serve important economic and national interests. CTDEP argues that it would be anomalous to allow a project to proceed “in total disregard” of CMP considerations. (CTDEP Brief at 14, n. 9). To the contrary, what would be anomalous – and what the CZMA expressly protects against – is the elevation of CMP considerations over all other environmental and non-environmental considerations.

CTDEP's protestation that NEPA is merely a procedural statute is a red herring; it ignores the fact that FERC (following NEPA procedures) undertook a substantive environmental

²⁴ For this purpose, CTDEP quotes extensively from *California v. Watt*, 520 F.Supp. 1359 (C.D. CA 1981), a case which was reversed by the Supreme Court. *Secretary of Interior v. California*, 464 U.S. 312 (1984). That aside, Islander East does not dispute that the CZMA was intended to and does give the states substantive and significant roles in the evaluation of projects affecting the coastal zone. Indeed, states are permitted to exercise their authority by denying CZMA certifications to projects, including federally approved projects, which they determine are inconsistent with their CMP's, just as CTDEP has done here. The fact remains that once the state has exercised that power, it is for the Secretary to determine whether such projects are nonetheless required by the national interest or the national security.

review of the Project and its impacts, including impacts on Long Island Sound. The point of the review process is that the Secretary can take the blinders off and look not only at coastal impacts, but also at the broader analyses conducted by FERC and New York, both of which concluded that the Project's temporary impacts are more than compensated by its long-term contributions to the national interest.

CTDEP also seems unable to accept the fact that environmental impacts can be, and in the case of Islander East largely will be, temporary. Islander East has never taken the position that the Project will not have any impacts, but its studies – and the studies undertaken by FERC, the Connecticut Siting Council, the New York Department of Environmental Conservation, the Town of Branford (specifically, The Garrett Group and Roberge²⁵) and Dr. Zajac – conclude that those impacts will be temporary, not permanent, and the affected area can be restored and will recover in a moderate amount of time.²⁶ In fact, CTDEP misstates the conclusions of a number of these reports. While CTDEP insists that The Garrett Group and Roberge Reports conclude that impacts will be more widespread than estimated by Islander East, a simple reading of the reports show that they actually conclude that the impacts will be less than estimated by Islander East.²⁷

In addition, having never mentioned the so-called “Thimble Islands complex” in any of (i) its comments to FERC, (ii) its submissions to the ACOE, (iii) its letters to the Siting Council,²⁸ or (iv) in its own original objection to the Project, CTDEP now attempts to define this “complex” as a broad area of pristine, ecologically sensitive resources extending across 15 miles of coastline with a linear reach of 6.2 miles. (CTDEP Brief at 42-43). There is nothing in the literature which supports that definition – it is a hyperbolic fiction created to serve Connecticut's

²⁵ The Garrett Group Report and the Roberge Report were independent evaluations initiated by the Town of Bradford to characterize the benthic environment and sedimentation impacts along the Islander East pipeline route to document the effects of construction and operation of the pipeline on Long Island Sound. Both reports corroborate Islander East's benthic evaluations and sediment modeling results and support FERC's conclusion that construction and operation of the Islander East pipeline will have limited, temporary adverse impacts.

²⁶ Technical Comments, *infra* Part Two at 44-45.

²⁷ *Id.* at 44-47.

²⁸ In fact, CTDEP's position here is inconsistent with its advice to the Siting Council that “[f]or most of the pipeline route, the seafloor is generally featureless and comprised of soft sediments (fine-grained, silty-sand and mud) that are typical of Central Long Island Sound.” Letter from CTDEP to the Siting Council, May 3, 2002. “Central Long Island Sound” is generally understood to mean the area between the eastern and western ends, and includes the near shore area. The glaring absence of an exception to this statement for a rocky Thimble Islands habitat suggests no such exception exists.

current purpose. Although CTDEP failed to mention the Thimble Islands in its comments to the Siting Council, the Siting Council did evaluate impacts to the Thimble Islands, and CTDEP has accurately quoted the Siting Council's characterization of the area's habitat. (CTDEP Brief at 44). The Siting Council also accurately characterized the area as "in the vicinity of the proposed off-shore pipeline route," not as crossed by the route.²⁹ The Siting Council did not find that the Project would have any adverse effects on the Thimble Islands, either in its Findings of Fact or Opinion.

CTDEP's insistence that Islander East "extends into the midst of the Thimble Island complex" (CTDEP Brief at 42) is nothing more than an effort to distract the Secretary from the actual coastal resources impacted by the narrow pipeline corridor.³⁰ All of the purported sensitivities of the so-called "Thimble Island complex" cannot be visited on Islander East because all of those sensitivities are not impacted by Islander East. Islander East is not "arbitrarily segment[ing] out" its pipeline (CTDEP Brief at 45); it simply expects the Secretary to evaluate the actual impacts of the proposed Project – something which the FERC EIS does very well.³¹

Moreover, while CTDEP now claims that the pipeline drives a route (CTDEP Brief at 1) through the Thimble Islands, or at least is in "an area that runs through the Thimble Island complex" (CTDEP Brief at 8), even it concedes that (a) the pipeline avoids "the most prominent features of the topography" and (b) its claim that the pipeline "slices through the area in question" (CTDEP Brief at 45) is based not on "the geographical place names" of the Thimble Islands, but rather on the "geophysical features of the . . . complex" including "all of the rock outcroppings and reefs in the area" (CTDEP Brief at 45).

In addition, CTDEP completely mischaracterizes the record of the Siting Council proceedings, selectively citing miscellaneous testimony while ignoring the fact that, after hearing the testimony and considering all of the record evidence, the Council issued a Certificate of Environmental Compatibility and Public Need for the Project. The Council concluded that "[t]he

²⁹ CSC Finding of Facts, par. 148.

³⁰ CTDEP's contention that Islander East has asserted that the Project "is nowhere near the Thimble Island complex" (CTDEP Brief at 43) is inaccurate. Islander East has always been explicit and factually precise about the location of the pipeline relative to the Islands. See Supplemental Memorandum at 6 and attached map.

³¹ FERC Final EIS at Section 33.0, Environmental Analysis; see in particular, pages 3-39 to 3-78.

effects of elevated suspended sediment concentrations in the water column could cause the suffocation and starvation of oysters and clams. However, we are confident that the installation of the off-shore segment of the proposed pipeline will not have significant impacts to shellfish resources located proximate to the proposed pipeline.”³² After recommending various monitoring and mitigation measures, the Council stated that “[w]e believe that these measures are appropriate, and will serve to mitigate any long-lasting effects to commercially valuable and ecologically important shellfish resources.”³³ The Decision and Order states that “[t]he Council approves of the proposed pipeline route with the following deviations . . .”, all of which have since been incorporated in the proposed route.³⁴

CTDEP similarly attempts to downplay New York’s certification of the Project as consistent with that state’s CMP. The fact that the two states disagree so fundamentally about the impacts of the same Project on the same body of water illustrates why the Secretary’s intervention is so critical, and why the Secretary should scrutinize CTDEP’s claims with special care.

CTDEP also relies on selected portions of comments filed by the Environmental Protection Agency (“EPA”) and a statement made by the ACOE in the ACOE license proceeding. (CTDEP Brief at 39-40 & n.32, 46-47). EPA’s comments (like NOAA’s) were submitted prior to the adoption by Islander East of modified construction methods to address concerns expressed by CTDEP and other agencies; accordingly, those comments are simply not germane. Moreover, it is not the role of the Secretary to evaluate those comments in this proceeding. The ACOE process is nearing completion. Its outcome will be determinative of the issues being considered there and, despite CTDEP’s best efforts to argue otherwise, it is not the Secretary’s job to anticipate that outcome. Similarly, CTDEP’s efforts to characterize the statements of the National Marine Fisheries Service (“NMFS”) in this proceeding are inaccurate and misguided. (CTDEP Brief at 48). As the record reflects, NMFS’ comments focus on potential impacts from construction measures that are no longer proposed. Islander East’s

³² Siting Council Opinion at 5.

³³ *Id.*

³⁴ Decision and Order, p. 4. Moreover, these findings were made on the basis of Islander East’s originally proposed construction methods; the modified procedures, of course, will serve only to further minimize impacts.

modified construction measures substantially address NMFS' concerns.³⁵ In fact, CTDEP is the only agency that has continued to assert that the project will have unacceptable impacts since Islander East's adoption of those modified procedures.

CTDEP states that it intends to deny a section 401 water quality consistency certification to the Project and argues that the denial "will be determinative, because it will constitute a legal bar to the permitting of this project." (CTDEP Brief at 21). This statement is both irrelevant and incorrect. Even if CTDEP issues the Section 401 denial, it would not moot this proceeding. In 2001, NOAA specifically removed the requirement that the Secretary make a finding that an "activity will not violate any of the requirements of the . . . Federal Water Pollution Control Act, as amended" in evaluating a negative consistency determination.³⁶ If CTDEP issues a denial, Islander East will pursue administrative and judicial avenues to reverse that decision.

Surprisingly, CTDEP even levels a broad attack on the extraordinary efforts Islander East has made to modify construction techniques to minimize the environmental impacts. (CTDEP Brief at 51-60). Reading its challenges together, one can only conclude that CTDEP seeks to impose a "zero tolerance" standard on any activities it considers sensitive. For example, the HDD method that Islander East has adopted will avoid disturbing nearly one mile of what CTDEP declares are highly sensitive coastal resources. But CTDEP attacks the HDD methodology because the exit pit (which is 100 feet by 300 feet) occurs "totally within a much larger area that is eminently suitable for the cultivation of shellfish." (CTDEP Brief at 52). There are no shellfish leases in the HDD exit out area and there is no support for the claim that

³⁵ Technical Comments, *infra* Part Two at 49-51

³⁶ NOAA explained:

Removal of this criterion does not alter in any way the Secretary's obligation to evaluate and consider the potential adverse effects of a proposed activity on the coastal air and water resources. NOAA will continue to seek the views and comments of the expert agencies charged with implementation of these statutes. The deletion of this criterion simply removes the obligation of the Secretary to develop an administrative finding that a proposed activity will or will not meet the requirement of the Clean Air Act and Clean Water Act. As the commenters point out, that obligation is fulfilled by other State and Federal Agencies. As provided for in the CZMA §307(f), States must include water control and air pollution control requirements in their management programs and those requirements may form the basis of a State objection.

(Footnote continued on next page)

the area is “eminently suitable” for shellfishing.³⁷ The area which would be temporarily disturbed by the exit hole is small, and even the temporary impacts can and will be minimized.

As a further example of “zero tolerance,” CTDEP’s previously expressed (and fully rebutted) concern about lobsters in the vicinity of the pipeline trench for the short duration of construction has now given way to a concern that “the release of HDD fluid in Long Island Sound may adversely affect larval lobsters.” (CTDEP Brief at 56). Likewise, CTDEP cites the Garrett Group Report prepared for the Town of Branford (CTDEP Brief at 54), but conveniently fails to note that this report concluded that the impacts could be addressed by modified construction techniques, the material ones of which Islander East has agreed to make. CTDEP also objects to Islander East’s proposal to fill the near shore pipeline trench with engineered backfill to minimize sedimentation because it potentially “disturbs” 5.5 acres of bottom. (CTDEP Brief at 55). It then seeks to magnify that miniscule impact by aggregating all impacts, declaring that the impacted area will be 3,700 acres, and then proclaiming that the entire aggregate impacts will negatively impact shellfishing. That kind of almost hysterical hyperbole has no place in a proceeding of this importance, least of all from a state government charged with protecting the public trust. (CTDEP Brief at 2, 12).

Finally, the CTDEP analysis completely overlooks the positive environmental effects of the Project. The Project will provide clean burning natural gas as an alternative to other, polluting fuels. It does so in a manner which takes advantage of the facilities of an existing pipeline system, thereby avoiding duplication of facilities. The land-based portion of the Project is located almost entirely in or adjacent to existing utility rights-of-way, thereby minimizing impacts to landowners and previously undisturbed land-based resources. In addition, the Project can be expanded to meet the growing needs of the market for additional gas supplies without any additional coastal effects.

Whether the Secretary looks at the actual, or the claimed, coastal impacts of the Project, if the Secretary also gives appropriate consideration to its environmental benefits and its

Final Rule, Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124, 77151 (Dec. 8, 2000).

³⁷ As CTDEP stated in its recent RFP for Long Island Sound studies, “[t]he state’s aquaculture division has suggested that all waters between the 10 and up to 40-foot depth contour are potential shellfish habitat and should be protected, however, there are no field studies to verify these claims.” See Supplemental Memorandum at 36-37; Technical Comments, *infra* Part Two at 34-35.

contributions to the national interest, it is clear that the Project's furtherance of the national interest substantially outweighs its actual, temporary coastal effects.

III. CTDEP HAS FAILED TO PROVIDE EVIDENCE THAT A REASONABLE, AVAILABLE ALTERNATIVE EXISTS TO THE ISLANDER EAST PROJECT.

As the Secretary explained in his recent decision in the Consistency Appeal of Millennium Pipeline Company, L.P. from an Objection by the State of New York, dated December 12, 2003 ("Millennium"), in considering whether an alternative exists that would allow a project to proceed consistent with a state's coastal management program, "it is necessary to determine what constitutes an alternative."³⁸ "As contemplated by NOAA's regulations, an alternative consists of one or more changes to the project that would allow the project, albeit in a somewhat different form, **to achieve its primary purpose** in a manner consistent with the state's coastal management program."³⁹ If a state identifies such an alternative, it is evaluated for four criteria: "(1) consistency (with the state's coastal management program); (2) specificity; (3) availability; and (4) reasonableness."⁴⁰ The state bears the burden of proving the alternative's consistency and of identifying an alternative with enough details to evaluate its reasonableness and availability.⁴¹

In this instance, CTDEP has failed to identify an "alternative" that would allow Islander East to achieve its primary purpose – transporting volumes of gas adequate to meet its customers' contractual demands via a new pipeline to Long Island, and providing the security and reliability associated with a second source of supply demanded by its customers and deemed vital for such a project by FERC, the NYPSC and the Department of Energy.

CTDEP has also failed to meet its burden of identifying its alternative with the specificity required by *Millennium*. In speaking of an alternative that would satisfy its CMP,⁴²

³⁸ See *Millennium* at 21.

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.* at 23.

⁴¹ *Id.* at 23-24.

⁴² It is difficult to understand how CTDEP reached the conclusion that an ELI-based alternative would be consistent with its CMP, since no such alternative was ever filed with CTDEP. Moreover, CTDEP's determination here that an ELI-based alternative would satisfy its CMP does not mean that that alternative is
(Footnote continued on next page)

CTDEP repeatedly confuses the ELI Extension Project and the ELI System Alternative. The ELI Extension Project was proposed, but subsequently withdrawn, by Iroquois to transport 175,000 mcf/d of natural gas to Long Island. The ELI System Alternative is a hypothetical alternative developed by FERC based, in part, on the ELI Extension Project, but which included additional facilities to make it capable of transporting the Islander East initial volumes of 260,000 mcf/day. Although CTDEP uses these terms interchangeably, and although FERC Staff determined that the ELI System Alternative offered certain environmental benefits over the Islander East route because it had a shorter sub-sea distance, neither FERC Staff nor FERC itself ever found the ELI Extension Project to be superior to the Islander East Project on any basis whatsoever.

Contrary to CTDEP's assertion, neither of the ELI alternatives would permit Islander East to achieve the primary purposes of its project as required by NOAA's regulations. The ELI Extension Project, as even CTDEP acknowledges, **cannot transport** even the initial quantity of gas which Islander East proposes to deliver. CTDEP's statement that "[t]he total dekatherm delivery is smaller . . . than that proposed by Islander East, but the arithmetical difference is actually a secondary aspect of the alternative's loss/benefit calculus and is adequate" (CTDEP Brief at 68) is nonsensical and highlights CTDEP's complete and inappropriate disdain for what it derides as the "energy issue."⁴³ What CTDEP appears to be arguing is that the public injury arising from inadequate gas supplies is offset by an alleged decrease in environmental impacts. CTDEP is not in a position to make this judgment.⁴⁴

In addition, both the ELI Extension and the ELI System Alternative would deliver gas from a point at the south end of the Iroquois system, which is vulnerable to any upstream

not subject to additional CZMA approval. Connecticut's alternative, unlike the alternative in *Millennium*, would require CZMA approval by a second state, New York. New York has not only not acted on this alternative; this alternative has never even been filed for New York's review.

⁴³ Indeed, contrary to the assertions of speakers at NOAA's November 5, 2003 public hearing that Iroquois currently has a great deal of unsubscribed capacity, Iroquois' web site indicates that it does not currently have any firm unsubscribed capacity. The website further indicates that although 10,000 Mcf/day of capacity is expected to become available in November 2005, that capacity is available only 9 months of the year and is subject to an existing customer's right of first refusal. <http://online1.iroquois.com/new-internet/igts/iol/informationalpostings/index.html>. The 10,000 Mcf/day of capacity, even if it became available, would carry less than 4% of the volume to be transported by Islander East.

⁴⁴ Extending this logic, a complete lack of gas supply would be acceptable because there would be no environmental impacts associated with facility construction – although there would, of course, be significant adverse environmental and political impacts associated with the use of additional coal and imported oil, and additional impacts on the public if the overall energy supply is ultimately inadequate.

disruption on Iroquois. They could not therefore serve another primary purpose of the Project – to be **independent** of the Iroquois pipeline to provide system reliability and security of supply. Moreover, both ELI alternatives are incapable of transporting expansion volumes without significant facility additions and associated land and water-based impacts.⁴⁵ Further expansion of the Iroquois system would only increase the vulnerability of the area’s infrastructure by increasing dependence on the only pipeline serving Eastern Long Island.

CTDEP’s statement that “any policy goal preference for a second pipeline could be adequately addressed by further inquiry into the role to be played by the ‘flexibility and reliability’ to be afforded by other, existing gas pipeline infrastructure that has been built or been recently nearing completion on Long Island” (CTDEP Brief at 67) is supported only by a reference to Iroquois’ Eastchester Extension and Transco’s existing pipeline into Long Island. (CTDEP Brief at 67, n. 61). As only a modicum of research would have shown, the Eastchester Extension serves Westchester County and New York City, not Long Island. It also has the same fatal flaw as the ELI System Alternative – it is an extension of the Iroquois pipeline and not independent of it. Moreover, “Transco’s pipeline onto Long Island” enters Long Island at its westernmost end. Even if that pipeline could be expanded, it would not be capable of serving Eastern Long Island because it terminates at the westernmost end of Long Island.

The fact remains that FERC, the agency charged by Congress with examining the existence of viable alternatives and ultimately siting interstate pipeline projects, reviewed all the reasonable alternatives and concluded that none could accomplish the essential objectives of the Project. Indeed, FERC just recently advised the Secretary directly that “there is no reasonable alternative which would permit the Islander East Project to be constructed consistent with the policies of Connecticut’s Coastal Zone Management Plan that will fulfill the Commission’s statutory mandates under the Natural Gas Act.”⁴⁶ Given FERC’s clear statutory responsibility in this area, that should be the end of the matter.

⁴⁵ Expansion of the ELI alternatives would require installation of offshore facilities upstream of the proposed ELI tie-in. Iroquois evaluated the installation of such facilities as an alternative to its proposed ELI route, but rejected it because of the significant adverse impacts to shellfish associated with construction of the upstream facilities. Iroquois Gas Transmission System, Application for a Certificate of Environmental Compatibility and Public Need, FERC Docket No. CP02-52-000, Section 1.6.4.1, pp.12-13 (March 25, 2002).

⁴⁶ Letter from Pat Wood III to Mr. Scott B. Gudes, October 20, 2003. FERC’s opinion is fully supported by the extensive record in the Islander East proceeding at FERC and FERC’s prior decisions in that proceeding.

Nonetheless, CTDEP states that the ELI Extension alternative is “available” and “reasonable” and asserts that the Secretary must therefore dismiss the appeal. (CTDEP Brief at 61-62). There is no basis for this argument. Neither the ELI Extension nor the ELI System Alternative are “available”. No one is currently proposing either project, least of all Iroquois, which owns the Iroquois pipeline. Islander East has no means of acquiring the Iroquois facilities on which these hypotheticals are based or of requiring Iroquois to negotiate or enter into agreements which would permit Islander East joint ownership of or access to those facilities. There is no process by which FERC or CTDEP can compel the use of the Iroquois’ pipeline for the purpose of constructing either hypothetical. As the Secretary explained in *Millennium*, alternatives that involve agreements with third parties have been determined “unavailable” in instances (like Islander East’s) where no part of the alternative could be undertaken without the agreement of a third party.⁴⁷ In this case, because use of the Iroquois facilities is essential to construction of either ELI alternative, this project could not be constructed without Iroquois’ consent and active participation in the project.⁴⁸

Finally, neither the ELI Extension nor the ELI System Alternative are reasonable. In *Millennium*, the Secretary defined “reasonableness” to refer to the “conclusion that an alternative’s advantages to the resources and uses of the state’s coastal zone exceed the alternative’s increased costs, if any.”⁴⁹ In this case, because CTDEP never conducted a thorough consistency review of the purported alternatives to determine if they would in fact satisfy Connecticut’s CMP, it has not satisfied its burden to provide adequate specificity to permit the Secretary or Islander East to determine the advantages to the resources and uses of the state’s coastal zone of using either alternative or to compare those advantages to the obvious costs of abandoning the Islander East project in favor of either alternative.⁵⁰ For example, while CTDEP

⁴⁷ *Millennium* at 30 n.97 (citing *VEPCO Decision*, May 19, 1994, at 45 (alternative unavailable because Virginia could not compel Norfolk to implement the proposal)). In contrast, in *Millennium* the Secretary found that the concurrence of Algonquin Pipeline Company was not an impediment to construction of an alternate route that would require Algonquin to share its right-of-way with *Millennium* and that an established process exists to obtain necessary regulatory approvals. *Id.*

⁴⁸ Because of Iroquois’ central role in such a project, Islander East would lose the ability to control the costs of the project and thus the costs of transportation to its customers, and it is unclear how this would affect the project.

⁴⁹ *Id.* at 24.

⁵⁰ The Secretary has held that he will simply rely on a state’s consistency determination in deciding whether the state has met its burden of demonstrating that an alternative is consistent with its CMP. *See Millennium* at 23. (Footnote continued on next page)

assumes benefits to the coastal zone, it does not analyze the environmental harms that would result from using either alternative, such as the need to tap into an operating, high pressure pipeline under thirty feet of water and ten feet below the seafloor within a shellfish bed.⁵¹

Nonetheless, as the FERC, NYPSC and Department of Energy have concluded, it is clear that the costs of abandoning the Islander East project would be significant, because it would deny Islander East's customers the independent source of supply they need to ensure secure and reliable gas supplies on Long Island and would fail to provide them with the capacity required to serve their contractual needs. In addition, the environmental costs of expanding Islander East to meet the growing needs of the market are far less than the environmental costs of expanding any of the ELI-based alternatives.

In short, CTDEP has failed to identify a reasonable, available alternative that would permit Islander East to achieve its primary purpose of transporting volumes of gas adequate to meet its customers' contractual demands via an independent pipeline crossing of Long Island Sound.

IV. ISLANDER EAST IS NECESSARY IN THE INTEREST OF NATIONAL SECURITY.

The Secretary may base his decision to override a state's negative consistency determination on an alternative ground – that the project is in the interest of national security. In making his decision on Ground II, the Secretary has stated that he will give “considerable weight” to the views of the Department of Defense and other federal agencies with regard to “whether the proposed project directly supports national defense or **other essential national security objectives**.”⁵² Moreover, he has specifically held that the standard for satisfying Ground II is a finding of “significant impairment” to a national defense or national security

Nonetheless, where: (1) the state has identified as consistent with its CMP an alternative which will clearly have significant impacts on both its coastal zone and the coastal zone of another state; (2) the state has failed to conduct a thorough independent review of actual consistency with its CMP or made detailed site-specific findings supporting its conclusion; and (3) the second state has never had an opportunity to review the alternative, such deference by the Secretary to the state's consistency determination of the alternative appears arbitrary and unreasonable.

⁵¹ The pipeline cannot be shut down for this operation because it transports the bulk of Long Island's gas supplies.

⁵² *Millennium* at 38 (emphasis added).

interest.⁵³ CTDEP argues that the Project is not necessary to ensure national security, relying on an April 29, 2003 letter from Under Secretary of Defense Philip Grone stating that “[w]e have reviewed the appeal and cannot conclude that a national defense or other national security interest would be significantly impaired if the project were not permitted to go forward as proposed.” (CTDEP Brief at 71).

The Grone letter deals only with national defense aspects of national security, and it does not undermine Islander East’s argument that the Project is necessary to safeguard other essential national security objectives. As Energy Secretary Abraham has pointed out, “energy security is a fundamental component of national security . . .”⁵⁴ Consistent with that statement, in a recent letter to NOAA, the Department of Energy emphasized that the Islander East Project would “provide a critical second, independent natural gas corridor to Long Island.”⁵⁵ As a result, it stated its “view that the Islander East project is necessary in the interest of energy security, and therefore necessary in the interest of national security,” and concluded “that the energy security of this important region, and therefore of the Nation, will be **significantly impaired** if the Islander East pipeline project is not permitted to go forward as proposed. See 15 CFR §930.122.”⁵⁶ In light of the considerable weight that the Secretary gives to the views of other agencies on this subject, the Department of Energy’s finding should satisfy the requirements of Ground II.

The Department of Energy’s conclusion is clearly supported by the facts. Because the Project will eliminate Long Island’s dependence on a single source of gas supply and provide incremental capacity to the region, it will enhance both energy reliability and security in Long Island and the ability to redirect natural gas to other regions in the event of an emergency. See note 13, *supra*. It will also reduce this country’s dependence on foreign oil. The tragedy of 9/11 demonstrated that the United States is potentially vulnerable to attacks on its basic infrastructures. It heightened the need to build a more secure and reliable energy infrastructure.

Id. at 39.

⁵⁴ Initial Memorandum at 59-61, quoting Spencer Abraham, United States Secretary of the Department of Energy, Statement Before the Committee on International Relations, U.S. House of Representatives, June 20, 2002, available at <http://www.energy.gov/HQDocs/testimony/2002/20020620v.htm>.

⁵⁵ Letter from Carl M. Smith, Assistant Secretary, Office of Fossil Energy, to Branden Blum, NOAA, Department of Commerce, supplementing its May 16, 2003 Letter, dated December 2003.

⁵⁶ *Id.* (emphasis added).

The far reaching effects of the blackout in August 2003 only strengthen that need and bolster Islander East's argument that this Project is necessary in the interests of national security.⁵⁷

CONCLUSION

Although CTDEP may assert that the facts in the *Millennium* case are similar to those in this proceeding, the cases are very different. First, in *Millennium*, the Secretary found that an alternative exists that would be consistent with New York's CMP and thus never considered the other factors supporting its claim that its project was in the national interest. Unlike *Millennium*, CTDEP can point to no alternative that would achieve the primary purposes of the Islander East project by providing a secure and reliable second source of supply to Long Island that could meet its customers' contractual requirements for incremental capacity and be readily expandable to meet the foreseeable growing need for gas in the region. In addition, while the Secretary determined that, under prior precedent, the *Millennium* alternatives were "available," the ELI alternative is clearly "unavailable" under those same precedents because it is in the complete control of a third party (Iroquois), and Islander East cannot construct it without Iroquois' consent, which cannot be compelled by Islander East, FERC or CTDEP. *Millennium* also involved a decision by one state that use of an alternative would satisfy its CMP, while CTDEP's alternative in the Islander East proceeding would need to satisfy the CMPs of both New York and Connecticut. In addition, in *Millennium*, the state provided details on several specific route changes, while CTDEP failed to meet its specificity burden in describing its alternative, relying instead on a conclusory proposal that lacked the specificity needed for the Secretary or Islander East to conduct an analysis of the "reasonableness" of the alternative. Finally, unlike Islander East, no federal agency found that the nation's security interests would be significantly impaired if the *Millennium* project were not constructed as proposed. In contrast, the Department of Energy emphasized that the Islander East project would provide a critical independent source of supply to Long Island and help to satisfy the region's growing need for power generation (as demonstrated by the August 2003 blackout). Relying on these facts, it specifically found that the

⁵⁷ The Department of Energy reached the same conclusion in its recent letter to NOAA, in which it emphasized that the blackout "underscored the fact that power generation capacity on Long Island and . . . southwestern Connecticut maybe inadequate to meet the growing needs of that region," and explained that the blackout provided a basis for its opinion that the Islander East project is necessary in the interest of energy and national security. *Id.*

energy utility of the United States, and thus its national security, could be significantly impaired if the other East project were permitted to proceed as proposed. The Corps of the Cross Sound (CS) if the Army does approve CIBEP CZMA determination that it will be the best where one state is stilling narrow parochial interests affect the being many states and many people in the face of approval key infrastructure project by federal agencies and state. Accordingly, [slander East again requests the Secretary to deny CTDE denial of and East request for consistency determination to the other East Project because the Project the national interest, the national interest outweighs adverse coastal effects that may result from the Project, there is no reasonable alternative to the Project, and the Project necessary in the interest of national security.

PART TWO

TECHNICAL COMMENTS

This Technical Appendix is organized into eight categories: alternatives, Thimble Islands, water dependent uses, bentonite release, contaminated sediments, other inaccurate statements, non-responsiveness and other comments, and outdated and misrepresented agency correspondence.

I. ALTERNATIVES.

- **Islander East Is The Only Available Alternative.**

CTDEP suggests that the ELI System Alternative is an option available to Islander East.⁵⁸ As described previously, the ELI System Alternative would not meet the primary purposes of the Islander East Project, which is to transport 260,000 dekatherms per day of natural gas to eastern Long Island and to increase the security and reliability of the gas supply system by providing a separate and independent pipeline crossing of Long Island Sound. Not only does the ELI System Alternative fail to meet this primary purpose of the Islander East Pipeline Project, it is not available. The ELI System Alternative would be based, in part, on facilities currently owned and operated by Iroquois. Islander East does not own Iroquois and cannot force Iroquois to lease capacity on its pipeline or to construct the facilities contemplated by the hypothetical alternative.

CTDEP's assertion that only another route for the Islander East Project will satisfy its concerns, and its claim that it is ready to assist in determining the suitability of project proposals, are disingenuous and out of time. Islander East's proposed route was thoroughly reviewed and evaluated by FERC and the Connecticut Siting Council over a period of approximately 16 months.⁵⁹ During their reviews, both agencies actively sought input from the public and other state and Federal agencies regarding the proposed pipeline route. CTDEP had ample opportunity

⁵⁸ Letter dated July 29, 2003 from the CTDEP to Islander East at 9.

⁵⁹ FERC received Islander East's application in June 2001 and issued a Certificate of Public Convenience and Necessity in September 2002. The Connecticut Siting Council received Islander East's application in December 2001 and completed its review in September 2002.

to and did participate in both proceedings, but made no objections to the proposed route until after FERC and the Connecticut Siting Council's reviews were concluded.

- **ELI System Alternative Would Permanently Impact Shellfish Lease Beds.**

CTDEP's assertion that other proposals serving the same general market area would not "damage vital coastal and water dependent activities such as shellfishing" is erroneous.⁶⁰ Although CTDEP does not identify other specific proposals, elsewhere in its brief it indicates that it considers the hypothetical ELI System Alternative and/or the recently withdrawn ELI Extension Project⁶¹ such proposals. The fact is that the ELI System Alternative would have chronic impacts on designated shellfish beds. The ELI System Alternative would require installation of an offshore sub-sea hot tap to connect it to the existing Iroquois pipeline. (This hypothetical system alternative would also require one new compressor station and the expansion of a second additional compressor station). The sub-sea hot tap would be located within shellfish lease bed number L-580, which is currently leased by the Fair Haven Clam & Lobster Co., L.L.C. Iroquois has indicated that installation of the sub-sea hot tap would impact approximately about 1.4 acres of the lease area.⁶² However, specific construction methods for the interconnect were never fully described or evaluated by FERC, the Connecticut Siting Council, or CTDEP. Islander East believes Iroquois' estimate of 1.4 acres represents only the area that would be directly impacted by the sub-sea hot tap installation (*i.e.*, excavation of the existing pipeline and spoil storage on the adjacent sea bottom), does not include any indirect impacts due to sedimentation, and therefore understates impacts associated with this alternative.

The presence of the existing Iroquois pipeline precludes the exclusive use of mechanical dredging at the tie-in because operating the clamshell bucket directly over or in the

⁶⁰ CTDEP Brief at 41.

⁶¹ CTDEP confuses the ELI System Alternative and the now defunct ELI Extension Project throughout its brief. The two are not the same. As previously described in the body of this reply brief, the ELI Extension Project is not a viable system alternative for all the same reasons that the ELI System Alternative is not an acceptable alternative. Accordingly, all of the comments made herein with respect to the suitability and offshore impacts of the ELI System Alternative also apply in full to the ELI Extension Project. In addition, the ELI Extension Project would not have sufficient capacity to transport the requested volumes of natural gas to Islander East customers.

⁶² Iroquois' ELI Extension Project draft EIS at 2-11.

immediate vicinity of the high-pressure gas pipeline risks causing extensive damage to it. Islander East estimates that 2,500 to 3,000 cubic yards of sediment would need to be moved by “soft” excavation methods near the existing Iroquois pipeline. Typical options for “soft” excavation methods in this situation include hand-jetting or use of an air-lift excavator. Each of these methods would suspend sediment into the water column, which could adversely affect shellfish lease beds used to cultivate oysters beyond the 1.4 acre impact area described by Iroquois.

Iroquois did not evaluate anchor impacts associated with mooring the installation vessel to be used during installation of the hot tap assembly. The approximate 30-foot water depth at this location is too deep for effective use of spud moored barges; therefore, the installation vessel would most likely be anchored in position creating additional, although minor, impacts within the shellfish bed due to anchor drops.

Disturbance at the sub-sea hot tap would also extend beyond the initial construction period. Iroquois’ application to the Connecticut Siting Council indicated that the sub-sea tap would need to be re-excavated and opened up every 7 to 10 years to install a temporary pig launcher for in-line tool inspection of the pipeline as required by U.S. Department of Transportation requirements for pipeline safety.⁶³ This chronic disturbance of the tap valve area would prevent complete restoration of the shellfish bed for the life of the facility. This process would likely require the same soft excavation techniques described above to access the launcher connection. Additional minor impacts would also be expected due to anchoring of the vessel used to install the launcher assembly each time.

- **CTDEP’s Notice Of Tentative Determination To Deny Section 401 Water Quality Certification Is Without Merit.**

On August 5, 2003, the CTDEP issued a Notice of Tentative Determination to deny Islander East’s application for a Section 401 Water Quality Certification. The Notice indicates that the Islander East Pipeline Project is inconsistent with SA/SB water quality standards.⁶⁴ CTDEP, however, did not identify this concern during the lengthy FERC and Connecticut Siting Council reviews. Moreover, this objection is inconsistent with the CTDEP’s apparent support of

⁶³ Iroquois’ ELI Extension Project, Connecticut Siting Council Application at 193. March 25, 2002.

⁶⁴ CTDEP Brief at 18.

the ELI System Alternative, which also crosses SA/SB waters. It is also inconsistent with CTDEP's authorization of past projects across Long Island Sound including the Cross Sound Cable, MCI and AT&T fiber optic cables, and Iroquois' original pipeline, which cross SA/SB designated waters. In fact, if equally and fairly applied to all projects, CTDEP's objection to the Islander East Project based on water quality standards would preclude any and all pipelines and cables across Long Island Sound since the waters of the Sound off Connecticut have the same SA/SB classification.⁶⁵

- **CTDEP Ignored Site-Specific Studies That Documented The Existing Environment Of Long Island Sound.**

CTDEP claims that the stratum profile associated with an Iroquois-based⁶⁶ alternative is more uniform than Islander East's and cites differences in the stratum profile as one of the reasons why it favors the Iroquois-based alternative.^{67,68} This comparison is not only irrelevant, but ignores the detailed data collected by Islander East. Islander East has completed and filed with CTDEP numerous detailed studies along the pipeline route to characterize the existing bottom environment, including: sub-bottom profiling, physical sediment probes, side scan sonar surveys, vibratory coring, diver surveys, benthic grab sampling, and comprehensive video surveys. The results of these studies indicate that the Islander East pipeline route crosses primarily soft sediments. CTDEP itself has supported Islander East's findings on multiple occasions. In its May 13, 2002 letter to the Connecticut Siting Council, CTDEP stated, "[f]or most of the pipeline route, the seafloor is generally featureless, and comprised of soft sediment habitats (fine-grained, silty-sand and mud) that are typical of Central Long Island Sound."⁶⁹

⁶⁵ SA/SB Water Quality Map.

⁶⁶ Refers to an alternative that would require interconnecting with Iroquois' existing pipeline approximately two miles off the coast of Connecticut (e.g., the ELI System Alternative and the ELI Extension Project).

⁶⁷ CTDEP Brief at 64.

⁶⁸ Actual data from the ELI Extension Project side scan sonar and sub-bottom profiler surveys is not available to Islander East. In its Connecticut Siting Council application, Iroquois indicates that no areas of shallow rock were encountered; however, other statements within the document leave this conclusion in doubt. For example, Section 2.4 (pages 145 and 146) indicates that some localized seafloor conditions that have been identified from this survey may require route alignment modifications and/or specialized engineering attention. These differences in the quality of data reported for the ELI Extension Project make any conclusions based on this data less compelling.

⁶⁹ CTDEP letter, dated May 13, 2002 to the Connecticut Siting Council at 3.

Again, in its May 17, 2002 letter to FERC commenting on Islander East's draft EIS, CTDEP reiterated that the bottom of Long Island Sound is relatively featureless for most of the route. In addition, CTDEP confirmed that the majority of Islander East's route crosses fine-grained cohesive sediments and Islander East's observations agree with a number of surveys done to characterize the seafloor.⁷⁰

This conclusion is also supported by the studies completed by the Garrett Group, which concluded that:

- The biological studies completed by Islander East are valid;⁷¹
- After all project related activities and secondary conditions associated with the construction have ceased, the bottom will recover after several years and return to the existing conditions;⁷²
- The HDD borehole will be a subsurface feature and will have no direct effect on the nearshore sea floor;⁷³
- The impacts associated with anchor depressions and cable sweep will be short term and will recolonize;⁷⁴
- Backfilling with an engineered infill should not pose any additional adverse effect to the post construction nearshore bottom;⁷⁵
- The release of drilling fluid at the exit area will be small and isolated and will rapidly dissipate into any background conditions;⁷⁶ and
- The pipeline route crosses unstable muddy bottom habitat that supports limited numbers of benthic species.⁷⁷

The results of Islander East's studies, as corroborated by the Garrett Group Report, indicate that the Islander East Project will not permanently impact the benthic environment and will not cross the complexity of substrates suggested in the CTDEP Brief.

CTDEP also incorrectly characterizes the Iroquois-based alternatives as taking "advantage of an existing utility corridor for a portion of its length."⁷⁸ In fact, after it

⁷⁰ CTDEP letter, dated May 17, 2002 to the FERC at 5.
Garrett Group Report at ES-1.

⁷² *Id.* at ES-2 and 14.

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 10.

⁷⁷ *Id.* at 5.

⁷⁸ CTDEP Brief at 65.

interconnects with Iroquois' existing pipeline in Long Island Sound approximately two miles offshore, such an alternative would proceed in a southeasterly direction across Long Island Sound and would not be adjacent to or follow Iroquois' existing pipeline or any other utility corridors in Connecticut waters.

- **CTDEP Erroneously Asserted Islander East Failed To Study Other Suitable Areas.**

CTDEP states that the pipeline could be located in an area where the water quality classification of the nearshore water is lower or where previous disturbance renders the location more suitable.⁷⁹ CTDEP goes on to claim in the text and in footnote 60 that Islander East has not examined these other suitable areas, which include New Haven Harbor, Saugatuck Harbor, Norwalk Harbor, Stamford Harbor, Greenwich Harbor, Guilford Harbor, the mouth of the Oyster River in Old Saybrook, the mouth of the Thames River, and the mouth of the Connecticut River.

In fact, Islander East did examine and present to Federal and state agencies two route alternatives in and around Guilford Harbor and a third route that would enter Long Island Sound in New Haven Harbor. The two Guilford alternatives were the "Sachem Head Alternative" and the "C-5 Alternative." Islander East and FERC rejected both of these alternatives because they would result in greater environmental impact than the proposed Islander East route. A third alternative, referred to as the "Amtrak Alternative" was identified and evaluated to determine if a route using the existing Amtrak railroad right-of-way from North Haven, Connecticut to Long Island Sound could be utilized to avoid construction through the towns crossed by the Islander East route. Islander East determined this route to be infeasible. In multiple locations, residential and commercial/industrial development and other utilities encroached on the rail corridor to the extent that it was not possible to identify a pipeline route through the congested area to New Haven Harbor. FERC reviewed this alternative and concurred with Islander East's assessment, thus eliminating this route from further consideration.

⁷⁹ *Id.* at 66.

- **Islander East Pipeline Was Sited To Minimize Environmental Impacts.**

In selecting the pipeline route, Islander East considered many factors. These included:

- location of the existing Algonquin pipeline system;
- location of Islander East's customers;
- capacity of the existing Algonquin pipelines and the improvements that would be required on Algonquin's existing pipeline systems to deliver the required volumes;
- length of new pipeline that would be required;
- existence and location of existing onshore utility or transportation corridors that could be used to minimize environmental impacts; and
- environmental resources that would be impacted by construction and operation; and the overall constructability of the pipeline route.

One of Islander East's primary goals was to identify a route that would minimize environmental impact by utilizing the existing Algonquin pipeline as much as possible, minimizing the length of new pipeline, and collocating the new pipeline with existing onshore utility and transportation corridors. Islander East also sought a route that avoids, to the extent possible, densely developed areas that would make construction and operation of the pipeline infeasible or highly intrusive, and a route that avoids highly environmentally sensitive terrestrial or marine habitats.

The siting criteria employed by Islander East are commonly accepted best management practices utilized by FERC and recognized by the Connecticut Siting Council as sound routing criteria. CTDEP's assertion that the pipeline could be sited in an area where the water quality classification nearshore is lower demonstrates the "blinders-on" approach that CTDEP is taking and fails to consider, or even acknowledge, that other criteria beyond their own programmatic interests can and must be considered when siting linear energy facilities.

As described above, it is clear that the Islander East pipeline is the only available project which would meet the primary purposes of transporting 260,000 dth/day to its customers via a separate and independent pipeline across Long Island Sound. Because the ELI System Alternative cannot meet the primary purposes of the project it is not an available alternative.

II. THIMBLE ISLANDS.

- **CTDEP Misrepresents The Location Of The Islander East Pipeline Route Relative To Thimble Islands.**

CTDEP states that the Islander East pipeline route crosses the Thimble Islands area and infers that the Thimble Islands area is an ecologically complex and pristine habitat.⁸⁰ CTDEP's characterization of the pipeline route is inaccurate, based on generalizations about the area, and ignores the numerous site-specific studies conducted by Islander East and a variety of consultants. In fact, the Garrett Group Report, which CTDEP purportedly supports, accepts the validity of Islander East's studies⁸¹ and the fact that the pipeline route crosses primarily soft substrate⁸² and not the complex and sensitive habitats indicated by CTDEP.

As discussed in Islander East's August 20, 2003 Supplemental Memorandum, the pipeline route was sited to avoid the Thimble Islands area and highly sensitive or exceptional habitats associated with the islands. Islander East consciously and deliberately moved the initial pipeline route further west to avoid the reefs located on the western edge of the Thimble Islands (Browns, Wheaton, Inner, and NW).⁸³ Islander East also confirmed through its subbottom survey that its use of spud moored barges for dredging will avoid direct impacts on rocky reefs located between MP 10.9 and MP 12.0, such as Dick Rocks (which is located approximately 1,000 feet east of the pipeline route).⁸⁴

The Seafloor In The Vicinity Of The Thimble Islands Area Is Disturbed.

CTDEP overstates the pristine nature of the area in which the pipeline would be located. CTDEP indicates that the submerged lands crossed by the Islander East Project have not been developed significantly. However, the Garrett Group Report recognizes that the project area is currently affected by several activities (*i.e.*, the maintenance of the mooring basin and the navigation channel into the Tilcon terminal, and historical and on-going aquaculture activities on

⁸⁰ *Id.* at 1.

⁸¹ Garrett Group Report at ES-1.

⁸² *Id.* at ES-2 and 10.

⁸³ Islander East Supplemental Memorandum at 25.

⁸⁴ See Islander East Response to CTDEP May 5, 2003 Request for Additional Information at 8.

designated grants), which have long contributed to limiting the project area's ability to succeed beyond a late successional/transitional benthic species community.⁸⁵ Moreover, navigation charts indicate that a number of the Thimble Islands are provided energy by power lines and pipelines installed *within* the Connecticut nearshore waters.

- **Islander East's Characterization Of The Pipeline Route Is Well Documented.**

CTDEP disregards the results of numerous studies and consultations that were undertaken by Islander East to characterize the biological and physical attributes of the project area and provided to CTDEP. Islander East also has had numerous discussions with local fisherman in order to document existing resources and identify potential environmentally sensitive areas. Islander East's investigations, which included a review of video obtained from a remotely operated vehicle,⁸⁶ indicate that the pipeline route crosses primarily soft sediments and that the organisms inhabiting these soft sediments are fairly typical and common throughout Long Island Sound.⁸⁷ These investigations also indicate that the pipeline route avoids rocky subtidal areas, eelgrass beds, glacial till, and hard bottom habitats that could be considered high quality oyster habitat.⁸⁸

Islander East's position that the pipeline route avoids hard benthic substrate is corroborated by prior CTDEP correspondence. As noted above, CTDEP has described the seafloor along the pipeline route as "generally featureless, and comprised of soft sediments (fine-grained, silt-sand, and mud) that are typical of Central Long Island Sound." It also concluded that the "habitat within the construction corridor will be temporarily disrupted and will take a period of time to recover" (*i.e.*, the impacts of construction would be temporary and the affected areas would recover over a period of time).⁸⁹

⁸⁵ Garrett Group Report at 5.

⁸⁶ *Analysis of Video Records of Sea Floor Features Collected by Remotely Operated Vehicle Along the Proposed Islander East Gas Pipeline Corridor in Long Island Sound.* Roman N. Zajac. August 21, 2002.

⁸⁷ See Islander East Response to CTDEP May 5, 2003 Request for Additional Information at 8-1.

⁸⁸ Thus, there is no basis for CTDEP's suggestion that the pipeline would impact shellfish beds in the Stony Creek and Thimble Islands that produce native oysters of extra quality.

⁸⁹ CTDEP May 13, 2002 letter to the Connecticut Siting Council at 3, *supra*. See the text of these Technical Comments at notes 11-12.

Islander East's characterization of the pipeline route is also supported by the Garrett Group Report, which concluded that the project area is composed of unstable muddy bottom habitat typical of Central Long Island Sound that supports limited numbers of benthic species.⁹⁰

- **CTDEP's Reliance On Dr. Lance Stewart's Testimony Is Misplaced.**

CTDEP's reference to Dr. Lance Stewart's direct testimony before the Connecticut Siting Council on April 12, 2002⁹¹ does not provide any evidence to the contrary. Dr. Stewart's statements, while passionate regarding the environmental state of Long Island Sound, are general and relevant only to Long Island Sound as a whole. His testimony is based on anecdotal information from fisherman, his general knowledge, and indirect references from scientific colleagues, and provides no site-specific data to support his arguments. The Connecticut Siting Council based no findings of fact on any citation to Dr. Stewart's testimony.

- **Islander East's Modified Construction Techniques Will Significantly Reduce Environmental Impacts.**

If one accepts, as numerous studies indicate, that the pipeline route does not cross the complex and sensitive environmental habitats that are of concern to CTDEP, then it is clear that the pipeline will not have a direct impact on these resources. Therefore, the only potential effect of the project on these areas would be indirect impacts. The primary potential indirect impact would be the dispersion of sediments from the construction area into surrounding sensitive habitats. Islander East investigated the potential for this impact by conducting sediment sampling, collecting wave and current data, and performing detailed sediment modeling based on the proposed construction methods. The results of these studies indicate that the dispersion of sediments will be localized and limited primarily to the immediate area of construction.⁹²

⁹⁰ Garrett Group Report at 5.

⁹¹ CTDEP Brief at 9.

⁹² W. Frank Bohlen, M.M. Howard-Strobel, and M.L. Thatcher. *An Initial Evaluation of Marine Sediment Dispersion Associated with the Installation of the Islander East Natural Gas Pipeline*. April 8, 2002. (Bohlen, et al.).

Applied Science Associates, Inc. *Results of SSFATE Model Simulations, Nearshore Connecticut, Long Island Sound*. February 2003. ("ASA Report")

Consequently, the pipeline will not have a significant impact on sensitive habitats associated with the Thimble Islands area.

In its brief, CTDEP comments on Islander East's originally proposed offshore construction methods, rather than on the modified construction methods Islander East agreed to use to mitigate offshore impacts following receipt of its October 15, 2002 CZM denial.⁹³ Therefore, the CTDEP comments refer to construction methods that are no longer proposed and ignore the significant construction modifications adopted by Islander East which will further reduce environmental impacts.

III. WATER DEPENDENT USES.

- **CTDEP's Contention That Islander East's Pipeline Is Not Water Dependent Is Untenable.**

CTDEP states that Islander East has taken an unprecedented position in considering the pipeline a water dependent facility.⁹⁴ In fact, Islander East's position that the water to land transfer of goods via pipeline is a water dependent activity has been acknowledged by both the State of New York and the U.S. Department of Commerce. Policy 2 of New York's Coastal Management Plan, which has been approved by the U.S. Department of Commerce, specifically lists "uses involved in the sea to land transfer of goods (for example: docks, loading areas, *pipelines*, short term storage facilities)" as water dependent.⁹⁵

CTDEP also states that Tilcon Connecticut, Inc ("Tilcon"), in contrast to Islander East, is a good example of a commercial/industrial facility that is coastal and water dependent.⁹⁶ Islander East concurs that Tilcon operates water dependent facilities, but believes CTDEP has failed to distinguish the water dependency of Tilcon's barge facilities from Islander East's pipeline. CTDEP's position that Tilcon is different seems to be based on the assumption that Tilcon first and foremost is a barging business. This view ignores the fact that Tilcon's primary business is the sale and transportation of aggregate stone and concrete.

⁹³ Islander East Supplemental Memorandum at 8.

⁹⁴ CTDEP Brief at 25.

⁹⁵ U.S. Department of Commerce, Final Environmental Impact Statement and the New York Coastal Zone Management Program, August 1982, page II-6-9.

⁹⁶ CTDEP Brief at 19.

According to its website,⁹⁷ Tilcon, which operates five crushed stone quarries and two sand and gravel pits in Connecticut,⁹⁸ is a leading supplier of quality crushed stone (aggregate), bituminous concrete and ready mix concrete throughout the state. In addition to its in-state production and transportation operations, Tilcon also operates barges and barge terminals along the eastern seaboard to deliver over 6 million tons of stone by water from its quarries to its customers in New York City and Long Island. This illustrates that barging is only one of several means by which Tilcon executes its business⁹⁹ and highlights the fact that Tilcon needs barges and barging facilities because of the location of its customers on Long Island and in New York City. Thus Tilcon's need for water dependent facilities is very similar to Islander East's in that both businesses have contracts to transport their products from Connecticut to customers on Long Island, which requires the use of water dependent facilities (a pipeline in Islander East's case and barges and a barge terminal in Tilcon's case). Consequently, if Tilcon's barging facility is a good example of a commercial/industrial facility that is coastal and water dependent, then so too is Islander East's pipeline.

- **Islander East's Proposed Construction Methods And Scheduling Will Minimize Adverse Impacts.**

CTDEP's claim that the pipeline will have long-term, negative consequences to a nationally important, water dependent and coastal dependent use is unfounded.¹⁰⁰ As discussed in its previous briefs, Islander East has consulted with the Coast Guard and other agencies and has worked extensively with local fisherman groups and Tilcon to avoid or minimize impacts on other water dependent uses during construction. Based on these consultations, Islander East has scheduled offshore construction of the pipeline to occur during the winter months to avoid the peak fishing season. Islander East has also agreed to notify and coordinate with fisherman regarding the construction schedule and has developed a gear compensation program to compensate commercial fisherman for any gear that is lost as a result of construction. Additionally, Islander East proposes to enhance the recovery of commercial shellfish beds

⁹⁷ <http://www.tilconct.com>

⁹⁸ All of these quarries and pits are located outside of the coastal zone.

⁹⁹ Tilcon also transports considerable aggregate by rail and truck.

¹⁰⁰ CTDEP Brief at 35.

crossed by the pipeline through seeding disturbed shellfish beds following installation of the pipeline. Since the pipeline will be buried beneath the seabed, it will not preclude or interfere with recreational boating, commercial shipping, future lobster migration or other water dependent uses such as shell fishing. Thus, the Islander East Project will not have a long-term effect on water dependent uses in Long Island Sound.

IV. BENTONITE RELEASE.

- **CTDEP Has Overstated The Magnitude Of A Potential Bentonite Release.**

CTDEP indicates that 7.4 million gallons of drilling fluid would be released during the reaming and swab passes of the HDD installation.¹⁰¹ CTDEP does not cite the source for these volumes, but generically states that they are based on the Connecticut Siting Council's findings. This is not accurate. The record confirms that Islander East has committed to containing 100 percent of the drilling fluid during the reaming and swab passes of HDD installation.¹⁰²

CTDEP correctly identifies that Islander East is proposing to install the pipeline at the Connecticut landfall using HDD, a trenchless construction method that will avoid impacting the designated commercial shellfish lease beds under the jurisdiction of the Town of Branford. However, CTDEP implies that the evaluation of an alternative crossing method, such as the allegedly "immensely destructive"¹⁰³ trenching technique, would be required to complete their review under the CZMA.¹⁰⁴ The record clearly indicates that Islander East would be required to

Id. at 7.

¹⁰² See:

- Connecticut Siting Council Findings of Fact, line 94;
- April 5, 2002 Direct Testimony of Edward D. Gonzales at 33 and 34;
- FEIS at 2-41;
- Bohlen, *et al.*, at 10;
- Connecticut Siting Council Evidentiary Hearing, dated April 11, 2002, lines 11-14 at 121;
- May 2003 response to CTDEP's May 5, 2003 request for additional information at 8-2, 8-3, and Impacts Analysis Report (Attachment to response 20 at 22 of 45);
- Islander East's response to public comments on its Section 404/10 application at 3-2; and
- Islander East's Supplemental Memorandum at 34 and 36.

¹⁰³ CTDEP Brief at 7.

¹⁰⁴ *Id.* at 8, 20.

complete the HDD pilot hole at the Connecticut landfall before starting other offshore pipeline construction.¹⁰⁵ As described in previous submissions to CTDEP,¹⁰⁶ were the HDD installation unsuccessful, Islander East would be required to submit new permit applications for an alternative installation technique. Therefore, CTDEP's claims regarding the need to have alternative crossing method plans are irrelevant to this proceeding.

- **Studies On The Potential Adverse Impacts Of HDD Negate CTDEP's Unfounded Speculations.**

CTDEP states that "Islander East concedes that the release of drilling fluid 'would likely occur at the HDD exit point, where the HDD exit area will be excavated,' but its conclusion that no impacts to shellfish beds are expected is unsupported."¹⁰⁷ Again CTDEP is simply ignoring the results of the detailed studies that Islander East completed to characterize the existing environment.¹⁰⁸ First and foremost, there are currently no designated Town of Branford shellfish lease beds located at the HDD exit area.¹⁰⁹ Second, Islander East completed sediment modeling to predict the fate and transport of drilling fluids released at the HDD exit area. Based on sediment modeling, Dr. Bohlen concluded that the drilling mud will flocculate and settle within the limits of the area that will be excavated during construction of the transition basin.¹¹⁰ As CTDEP is aware, Islander East will excavate the transition basin after the successful completion of the HDD pilot hole. Therefore, drilling mud released during the pilot hole phase of the HDD installation will be recovered during the excavation of the transition basin and placed into barges for offshore disposal.

¹⁰⁵ Connecticut Siting Council Decision and Order Condition 21, FERC Order, Environmental Condition 21 at 54.

¹⁰⁶ May 2003 response to CTDEP's May 5, 2003 request for additional information at 14-2.

¹⁰⁷ CTDEP Brief at 53.

¹⁰⁸ Islander East's comments on Notice of Tentative Determination to Deny the Section 401 Water Quality Certificate, dated August 28, 2003 at 4.

¹⁰⁹ Islander East Supplemental Memorandum at 37.

¹¹⁰ Bohlen, *et al.* at 9.

V. CONTAMINATED SEDIMENTS.

- **Islander East's Sediment Sampling And Modeling Demonstrate Minimal Adverse Impacts.**

CTDEP states that Islander East has completed "only a limited amount of sediment testing."¹¹¹ Islander East completed a sediment sampling and testing program in consultation with CTDEP and actively sought comments from CTDEP on its sediment testing program over two years ago. The CTDEP has, up to this point, never indicated that additional sampling would be required. In fact, CTDEP indicated to the FERC and Connecticut Siting Council that Islander East's sediment sampling was adequate and that no further testing was warranted.¹¹²

Because no site-specific data was available on potential contaminants along the proposed pipeline route, Islander East collected site-specific sediment samples to characterize the sediments in the area. The final EIS attests that CTDEP assessments to date of the pipeline corridor sediments have not indicated that any contamination problems are present.¹¹³

- **CTDEP Ignores Islander East's Sediment Sampling And Modeling.**

On August 2, 2001, Islander East representatives met with CTDEP and provided a copy of an offshore study plan which outlined studies that Islander East proposed to conduct for Long Island Sound. This study plan included sediment sampling and testing at locations identified along the Islander East route. Islander East requested that CTDEP provide comments on the plan and also requested a follow-up meeting to present the details of the work plan. CTDEP failed to provide comments on the offshore study plan or agree to a follow up meeting. On February 7, 2002, Islander East met with CTDEP and informed them that the sediment sampling program was completed in August and September of 2001; again, CTDEP had no comment. On February 13, 2002, Islander East submitted its application for a Section 401 Water Quality Certificate, which included the Vibratory Core Sampling Report,¹¹⁴ detailing the sampling and analysis methods and the laboratory results. This report was also provided to

¹¹¹ CTDEP Brief at 19.

¹¹² CTDEP May 17, 2002 letter to the FERC at 5; CTDEP May 13, 2002 letter to the Connecticut Siting Council at 3.

¹¹³ Islander East final EIS at 3-43.

¹¹⁴ TRC Environmental Corporation. *Vibratory Core Sampling Report*. February 4, 2002.

- **Islander East Thoroughly Evaluated Impacts From Sedimentation.**

CTDEP also indicates that the dispersion of contaminated sediments has not even been studied.¹¹⁸ Islander East attempted to coordinate with CTDEP regarding sediment deposition and modeling on August 2, 2001 as part of Islander East's proposed offshore environmental survey program. Islander East provided CTDEP with copies of the results of these surveys on September 5, 2002. Islander East then modified its proposed construction methods to address the concerns CTDEP identified in their October 15, 2002 CZM denial. Subsequently, Islander East conducted additional sediment modeling analysis and provided results of these studies to CTDEP on February 19, 2003 as part of the amendment to the Section 401 Water Quality Certificate application. These studies evaluated the depth of sediment deposition and areal extent of sediment deposition that would result from dredging and spoil erosion along the HDD and the dredged trench. These studies indicate that no areas of the seafloor would receive sediment deposits greater than approximately 3 millimeters in thickness if the modified construction methods are used. The results of these studies would be applicable to both contaminated and non-contaminated sediments.

In summary, Islander East has conducted thorough studies concerning sediment deposition and has provided the results of these studies to CTDEP on numerous occasions.¹¹⁹ CTDEP has had numerous opportunities over the past two years to indicate to Islander East that contaminated sediment deposition studies are significant in their review process of Islander East's Section 401 Water Quality Certificate application and that Islander East's existing studies were inadequate, but CTDEP said nothing. Instead, CTDEP announced this concern to the Department of Commerce at the eleventh-hour in an effort to rationalize their consistency denial. Logic dictates that sediments will be deposited at the same rate whether contaminated or not, and therefore, the results of the sediment deposition modeling Islander East provided to CTDEP can be applied to contaminated sediment deposition as well.

¹¹⁸ CTDEP Brief at 20.

¹¹⁹ September 5, 2002 letter from Islander East to the CTDEP (Sue Jacobson); February 19, 2003 Amendment to Islander East's Section 401 Water Quality Certificate application, Attachment A; and March 14, 2003 Section 401 Water Quality Certificate application, Attachment F.

VI. OTHER INACCURATE STATEMENTS.

- **The Islander East Pipeline Project Has Been Neither Obscure Nor Unknown To The Public.**

CTDEP's claim that its action responds to Islander East's inadequate scoping of the project is specious.¹²⁰ Prior to filing its application with the FERC, Islander East hosted a series of three open houses in Connecticut communities along the proposed pipeline route. Landowners, elected officials, and other concerned stakeholders were invited to attend by direct mail, as well as by announcements in local newspapers. The purpose of these open houses was to provide information about the project, enable Islander East personnel to meet one-on-one with landowners to address questions and begin a dialogue with communities affected by the project. When Islander East filed its application with FERC on June 15, 2001, copies of the application were also provided to elected officials in each municipality affected by the project. These municipalities included the Towns of Cheshire, Wallingford, North Haven, East Haven, North Branford, and Branford. Copies of the FERC application were also provided to public libraries for public review. In addition, FERC also conducted extensive scoping which included a Notice of Intent to affected landowners, agencies and municipalities, public meetings, and subsequent mailings to individuals and parties on FERC's mailing list (see a detailed description of the public scoping completed by FERC in Section 1.3 of the final EIS).

To solicit input from resource management agencies during its Connecticut Siting Council review process, Islander East provided copies of its draft application documents to CTDEP. CTDEP reviewed these materials and provided extensive comments to the Connecticut Siting Council.¹²¹ Additionally, CTDEP participated in interagency scoping meetings with FERC and provided scoping comments to that agency as well. Islander East participated in nine community public hearings related to its Connecticut Siting Council Application.¹²² In addition, the Connecticut Siting Council held four public hearings in communities located along the pipeline route and five evidentiary hearings.¹²³

¹²⁰ CTDEP Brief at 1.

¹²¹ CTDEP May 13, 2002 letter to the Connecticut Siting Council.

¹²² Islander East participated in public hearings in Branford on October 9, 10, 11, 16, and 17, 2001; Guilford on October 15 and 22, 2001; Cheshire on October 24, 2001; and North Branford on November 8, 2001.

¹²³ Connecticut Siting Council Findings of Fact at Paragraph 3

The ACOE has also provided an opportunity for CTDEP and the public to provide written comments during two public comment periods. In addition, the ACOE held a public hearing in the Town of Branford on August 5, 2003.¹²⁴

Lastly, Islander East complied with Connecticut General Statutes, Section 22a-6g, regarding public notification requirements. Islander East filed its application for a Section 401 Water Quality Certificate on February 13, 2002.¹²⁵ In a letter dated February 18, 2002, Islander East provided to CTDEP copies of its Certification of Notice Form – Notice of Application, and a true copy of the Notice of Permit Application that was published in the February 17, 2002 edition of the New Haven Register,¹²⁶ which fulfilled the permit public notification requirements.

It is clear that the Islander East Project has been adequately scoped by Federal and state agencies with ample opportunity for public involvement.

- **Islander East Made Significant Modifications To Its Project To Reduce Environmental Impacts.**

In addition, CTDEP acknowledges that Islander East made “some” effort to reduce adverse environmental impacts, but understates the reduction in environmental impacts achieved by Islander East’s current project design.¹²⁷ As described in its Supplemental Memorandum, Islander East has proposed modifications that will reduce construction-related impacts associated with dredging and offshore barge passes by over 124 acres and 224 acres, respectively.¹²⁸ CTDEP, however, downplays the mitigation measures that were adopted to address their stated concerns regarding impacts associated with offshore construction techniques.¹²⁹

¹²⁴ U.S. Army Corps of Engineers Public Notice, dated July 3, 2003.

¹²⁵ Letter dated February 13, 2002 from Gene Muhlherr (Islander East) to Robin Bray (CTDEP).

¹²⁶ Letter dated February 18, 2002 from Joe Reinemann (Islander East) to Betsy Wingfield (CTDEP).

¹²⁷ CTDEP Brief at 5.

¹²⁸ Islander East Supplemental Memorandum at 8.

¹²⁹ October 15, 2002 Consistency denial letter.

- **CTDEP Misstated Potential Impacts On Wetlands And The Extent Of Connecticut Waters Crossed by the Islander East Pipeline.**

CTDEP indicates that the Islander East Project will involve filling portions of over 30 acres of wetlands.¹³⁰ This is a red herring. As described in its original CTDEP permit application, no wetlands will be permanently filled as a result of construction.¹³¹ Moreover, CTDEP's reference to wetland impacts includes wetland areas that are not even subject to this proceeding.

CTDEP also inflates the description of construction impacts by including the portion of the pipeline route located in New York waters of Long Island Sound.¹³² Only 11 miles of the Islander East Project will be located in the Connecticut waters of Long Island Sound. Additionally, as described in Islander East's Initial Memorandum, the larger portion (11.6 miles) of the project in New York state waters of Long Island Sound has already been found by the New York State Department of State to be consistent with New York's Coastal Zone Management Program.¹³³

- **CTDEP Distorts The Connecticut Siting Council Record.**

CTDEP states that Islander East has mischaracterized the Connecticut Siting Council proceedings, but it is CTDEP – not Islander East – that has mischaracterized the Connecticut Siting Council record. For example, CTDEP cites Finding Numbers 148 and 159 as evidence of the unique environment and of the “succinct catalogue” of the adverse impacts on the benthic community.¹³⁴ However, in its Opinion, the Connecticut Siting Council concluded that the installation of the off-shore segment of the proposed pipeline *will not have significant impacts* to shellfish resources located proximate to the proposed pipeline and that the adoption of the Connecticut Siting Council's mitigation measures will serve to mitigate any long-lasting effects to commercially valuable and ecologically important shellfish resources.¹³⁵ This determination

¹³⁰ CTDEP Brief at 6.

¹³¹ February 13, 2002 permit application, Part III, question 10 at 13 of 58.

¹³² CTDEP Brief at 7.

Islander East Initial Memorandum at 26.

¹³⁴ CTDEP Brief at 44, 49.

¹³⁵ Connecticut Siting Council Opinion at page 5.

was based on the original construction methods, which have since been modified to reduce impacts in the nearshore waters by 90 percent.

- **CTDEP Overstates The Impact Of Offshore Construction.**

CTDEP exaggerates the impact of offshore construction. For example, CTDEP states that the project will impact more than 3,000 acres of Long Island Sound.¹³⁶ As detailed in application materials filed with CTDEP,¹³⁷ the offshore impacts, including New York waters, total approximately 2,520 acres. The total acreage attributable to Connecticut waters of Long Island Sound would equal approximately *1,121 acres*. Another example of exaggeration is CTDEP's assertion that the Islander East Project would require dredging 44,700 cubic yards of sediment.¹³⁸ As described in the application materials filed with CTDEP and the U.S. Army Corps of Engineers, Islander East will dredge up to 24,000 cubic yards of sediment.¹³⁹

- **CTDEP Has Taken Contradictory Positions On Sediments.**

CTDEP makes contradictory statements about the sediments along the pipeline route. On the one hand, CTDEP characterizes the sediments along the pipeline route as undisturbed.¹⁴⁰ On the other hand, CTDEP acknowledges that the bottom is very actively in use (i.e., disturbed) by commercial and recreational shell fishermen.¹⁴¹ CTDEP cannot have it both ways. In addition, other activities that disturb the sea floor include storm-induced sediment transport, recreational and commercial boat traffic and anchoring, and the periodic maintenance dredging of the Tilcon navigation channel. In fact, when comparing shellfish harvesting activities to installation of a recent Cross Sound submarine cable, CTDEP concluded that "maintenance and harvesting of oyster beds.....suspend far more sediment for longer periods and at a time of year when organisms are more vulnerable than will the placement of this cable."¹⁴²

¹³⁶ CTDEP Brief at 8, 38, 55, and 57.

¹³⁷ Amendment to Section 401 Water Quality Certificate application dated February 19, 2003 at 4.

¹³⁸ CTDEP Brief at 8.

¹³⁹ Offshore Dredge Disposal Permit Amendment dated July 29, 2003.

¹⁴⁰ CTDEP Brief at 19, 20.

¹⁴¹ *Id.* at 43.

¹⁴² Cross Sound Cable Memorandum of Decision, March 14, 2002.

- **CTDEP Has Been Inconsistent Regarding Impacts On Shellfish Beds.**

CTDEP's position regarding impacts on shellfish beds is also inconsistent. CTDEP claims that the dredging of the Tilcon channel does not interfere with shellfish beds or shellfishing even though Tilcon's maintenance dredging directly impacts three designated shellfish lease beds.¹⁴³ At the same time, CTDEP says Islander East's use of a trenchless construction technique (i.e., horizontal directional drilling) to avoid the Town of Branford shellfish beds would permanently disturb shellfish habitat and permanently disrupt shellfishing.¹⁴⁴

CTDEP summarizes comments filed by the National Marine Fisheries Service ("NMFS") on Islander East's appeal and indicates that anchor depressions create hypoxic or anoxic pits incapable of supporting benthic organisms.¹⁴⁵ This statement is not supported by the reference cited in the NMFS June 4, 2003 memo.¹⁴⁶ In contrast, Dr. Roman Zajac concluded that an anchor depression "actually can become active habitat for a number of organisms because it does add dimensionality to the system."¹⁴⁷

- **Engineered Backfill Plan Will Provide Suitable Habitat For Oysters And Clams.**

CTDEP indicates that the original characteristics, functions, and values associated with the impacted area cannot be fully restored because Islander East plans on using an engineered backfill instead of backfilling with fluidized sediment.¹⁴⁸ A multi-agency meeting was held on April 15, 2003 to discuss Islander East's Engineered Backfill Plan. Participants, including representatives from CTDEP, the Connecticut Department of Agriculture – Bureau of Aquaculture, the NMFS and Islander East agreed that the sand proposed for use in the

Project Consulting Services. MAP-03. March 12, 2003.

¹⁴⁴ CTDEP Brief at 19.

¹⁴⁵ *Id.* at 48.

¹⁴⁶ The June 4, 2003 memo indicates on page 4 that "Pits created by anchor placements, particularly of the size used for pipe laying, can capture organic materials and semi-motile species creating hypoxic or anoxic traps incapable of supporting benthic organisms." The memo attributes this conclusion to a report prepared by Bohlen, Cohen and Strobel. However, no such conclusion was offered in the report.

¹⁴⁷ Connecticut Siting Council Evidentiary Hearings, April 12, 2002 at 56, lines 14 – 16.

Engineered Backfill Plan would provide a substrate that could be utilized by clams and oysters and would not create habitat for shellfish predator species.¹⁴⁹ The proposed backfill plan, which specifies backfilling the trench with rock topped by sand in the HDD exit area and dredge section, would result in equal or greater habitat for naturally occurring oysters as compared to existing sediments in the project area.

- **Multiple Studies And Analyses Support The Temporary Nature Of Environmental Impacts.**

Islander East's conclusion that the area temporarily impacted as a result of construction can be restored and will recover over time is supported by the Connecticut Siting Council, Dr. Roman Zajac, and the Garrett Group Report:

- The Connecticut Siting Council concluded that, "[t]he effects of elevated suspended sediment concentrations in the water column could cause the suffocation and starvation of oysters and clams. However, we are confident that the installation of the off-shore segment of the proposed pipeline will not have significant impacts to shellfish resources located proximate to the proposed pipeline."¹⁵⁰
- Dr. Zajac, a shellfish and marine life expert, stated that post-construction natural recovery of the primarily mud habitat crossed by the project should occur within three to four years.¹⁵¹
- The Garrett Group also concluded that "[a]fter all project related activities and secondary conditions associated with the construction have ceased, the bottom will recover after several years and return to the existing condition."¹⁵²

CTDEP claims that the Garrett Group Report and the Roberge Report support the conclusion that sedimentation impacts will be more widespread than estimated by Islander East.¹⁵³ CTDEP is mistaken.

¹⁴⁸ CTDEP Brief at 49.

¹⁴⁹ April 15, 2003 Multi-agency Meeting Notes.

¹⁵⁰ Connecticut Siting Council Opinion at 5.

¹⁵¹ Connecticut Siting Council Evidentiary Hearings on April 11, 2002, at 134, Lines 17 and 18.

¹⁵² Garrett Group Report at 14.

¹⁵³ CTDEP Brief at 54.

The Garrett Group Report

The findings presented in the Garrett Group Report support the conclusion of Islander East's offshore benthic studies, as highlighted below, that the project's impact on offshore resources will be short term and temporary and agree with FERC's final EIS conclusion that with the use of Islander East's proposed mitigation and adoption of FERC's recommended mitigation measures, construction and operation of the proposed facilities would have limited adverse environmental impact. The report:

- states that the bottom will recover and return to the existing condition.¹⁵⁴
- states that the change in bottom relief resulting from backfilling the HDD exit area and dredged trench section will not pose any additional adverse effect to the post-construction nearshore bottom.¹⁵⁵
- recommends the use of engineered fill in the trench to create a varied benthic habitat, provide shelter/relief, and *enhance* nearshore bottom conditions.¹⁵⁶
- recommends the use of third party environmental inspection, the adherence to construction timing windows, no side casting of dredged material and the development and implementation of a 5-year benthic monitoring program.¹⁵⁷
- concludes that the project area is composed of unstable muddy bottom habitat that supports limited numbers of benthic species and is currently affected by several activities which limit the area's ability to succeed beyond a late successional/transitional species community.¹⁵⁸

Roberge Report

The Roberge Report corroborates Islander East's sediment modeling and supports FERC's conclusion that construction and operation of the Islander East Project will have limited adverse environmental impact.

The Roberge Report concludes that sedimentation as a result of construction will not exceed 2.7 mm within the Connecticut waters of Long Island Sound.¹⁵⁹ This is consistent with Islander East's sediment modeling, which concludes that no area within Connecticut waters will

¹⁵⁴ Garrett Group Report at ES-2 and 14.

¹⁵⁵ *Id.* at ES-1.

¹⁵⁶ *Id.* at 15, 17.

¹⁵⁷ *Id.* at 16.

¹⁵⁸ *Id.* at 5.

experience sediment deposition greater than 3 mm,¹⁶⁰ which is less than the critical burial depth of juvenile oysters and clams.¹⁶¹

A comparison of the thickness of sediment deposited from the Roberge Report using the “worst-case scenario” versus Islander East’s sediment modeling completed by Applied Science Associates, Inc. (“ASA”) is provided in the table below.

Islander East Project									
Milepost Location	Report ¹	Thickness of Sediment Deposited (mm)							
		Distance from Trench Centerline (meters)							
		5	20	80	100	200	300	400	1000
10.9	Roberge	2.7	0.4	0.1	0.1	0.1	0.0	0.0	0.0
	ASA	2.0– 3.0	2.0 – 3.0	1.0 – 2.0	1.0 – 2.0	0.0	0.0	0.0	0.0
11.5	Roberge	2.5	0.4	0.1	0.1	0.1	0.0	0.0	0.0
	ASA	0.25 - 0.5	0.25 - 0.5	0.25 - 0.5	0.25 - 0.5	0.0	0.0	0.0	0.0
12.0	Roberge	2.4	0.4	0.1	0.1	0.1	0.0	0.0	0.0
	ASA	0.25 - 0.5	0.25 - 0.5	0.25 - 0.5	0.25 - 0.5	0.25 - 0.5	0.0	0.0	0.0
¹ Roberge Potential Sedimentation Impacts Which Could Result From Dredging. John C. Roberge. May 5, 2003. ASA Results of SSFATE Model Simulations, Nearshore Connecticut, Long Island Sound. Applied Science Associates, Inc. February 2003. <i>Bold italic</i> identifies the locations where the Roberge Report indicates that sediment deposition will be less than that modeled by Islander East									

Based on the results using the worst-case scenario contained in the Roberge Report, it is clear that Islander East has not understated or misrepresented the facts. The Roberge Report corroborates Islander East’s sediment modeling results and, in some cases, concludes that less sediment will be deposited on the seafloor than that reported by Islander East.

Islander East’s impact on the suspended sediment concentrations would be within the natural environmental variability of suspended sediment concentrations in the project area. Suspended sediment concentrations measured within the project area in 2003 by Dr. Frank Bohlen documented ambient conditions to be as high as 400 mg/l,¹⁶² which is within the range of short term dredging induced suspended sediment concentrations (according to the Roberge

¹⁵⁹ Roberge Report at ES-1.

ASA Report, Table 1 at 4.

¹⁶¹ Connecticut Siting Council Opinion in Docket 224, September 5, 2002.

¹⁶² Bohlen, *et al.*

Report, suspended sediment concentrations within the immediate vicinity of the dredge bucket can range from 50 to 250 mg/l). As confirmed by the Roberge Report, suspended sediment concentrations return to pre-project levels almost immediately following cessation of trenching operations.

It appears that the results in the Roberge Report were based on Islander East's dredging 51,000 cubic yards of sediment and side casting the material on the seafloor adjacent to the trench line.¹⁶³ In addition, it appears that the Roberge Report assumed that it would be necessary to excavate a trench 8 feet below the seafloor to provide 18 inches of cover over the 24-inch-diameter pipeline between MPs 10.9 and 12.0. In contrast, Islander East's sediment model is based on excavating a trench approximately 4.5 feet deep with 3:1 side slopes, which would require placing 27,840 cubic yards of sediment onto barges for offshore disposal. Since completing its February 2003 sediment modeling, Islander East has concluded that it will be feasible to excavate a trench with 2:1 side slopes, which will reduce the volume of dredge material to 24,000 cubic yards.

Islander East has adopted numerous offshore construction best management practices, such as constructing during the winter months, placing excavated spoil on barges, reducing the depth of cover over the pipeline, requiring environmental training for all construction personnel, and covering the pipeline with an engineered backfill which is consistent with the recommendations contained in the Garrett Group Report. All of the studies completed to date, including the sediment modeling results discussed above, support the conclusion that construction and operation of the Islander East Project will have limited and temporary adverse environmental impact.

¹⁶³ On page ES-1 of the Roberge Report, the text indicates that the material excavated from the trench line would be placed on barges. Yet on page 9, the Roberge Report states that "Table 5 summarizes these estimated layer thicknesses" and that "[i]t is anticipated that the coarser fractions of the trench excavation will be placed immediately next to the trench. These materials will be used to backfill the trench after the pipeline is placed." As indicated in application materials filed with the U.S. Army Corps of Engineers and CTDEP, Islander East will place all of the material excavated from the trench onto barges for offshore disposal and will cover the pipeline with an engineered backfill.

VII. NON-RESPONSIVENESS AND OTHER COMMENTS.

- **CTDEP Has Failed To Cooperate With Islander East.**

Islander East has offered to meet with CTDEP on numerous occasions to discuss its project in detail and respond to questions and solicit feedback on its project. Unfortunately, CTDEP has not been willing to meet or provide any form of feedback. For example, Islander East requested a meeting to follow up on detailed technical information provided to CTDEP on May 27, 2003 in response to its May 5, 2003 information request. Despite numerous attempts by Islander East to schedule a meeting, CTDEP informed Islander East on July 8, 2003, nearly one month after Islander East's initial request for a meeting, that they were unavailable to meet to discuss the project. CTDEP has not made a concerted effort to review and process Islander East's permit applications.

In their July 29, 2003 decision on rehearing, CTDEP dismisses the significant construction modifications made by Islander East and now states that "[w]hile pipeline construction is not inherently inconsistent with the CZMP, the siting of [the pipeline] in this location is."¹⁶⁴ This statement underscores the evolutionary nature of CTDEP's objection to this project. In the initial denial, CTDEP objected on the grounds of impacts to tidal wetlands, water dependent uses, shellfish habitat and water quality. Although CTDEP identified an alternative that they deemed to be favorable to the Islander East proposal, the modifications developed by Islander East, and reviewed in consultation with CTDEP as well as other pertinent agencies, including the NMFS, ACOE, EPA and Connecticut Department of Agriculture – Bureau of Aquaculture, directly addressed the stated concerns of CTDEP and reduced impacts to a level at or below the CTDEP's preferred alternative, the ELI System Alternative. Taking this issue further, CTDEP participated in scoping discussions and provided comments to both the FERC and Connecticut Siting Council during their respective environmental reviews. At no point during the process did CTDEP indicate that this location was entirely unacceptable to them.

¹⁶⁴ CTDEP Brief at 5.

- **CTDEP Participated In Every Phase Of The Development Of The Islander East Pipeline Project.**

CTDEP indicates that Congress intended that the states be involved at the initial stages of decision-making related to the Coastal Zone.¹⁶⁵ CTDEP cannot in good faith claim that they were not involved in the early stages of the Islander East Project. FERC and the Connecticut Siting Council both solicited input from numerous state agencies, including CTDEP, during their respective review processes. CTDEP representatives participated in interagency scoping meetings with FERC, participated in FERC and Connecticut Siting Council site-visits, provided comments to FERC during the EIS process, and provided technical comments to the Connecticut Siting Council prior to the Connecticut Siting Council conducting rigorous evidentiary hearings and developing decision documents and findings of fact for this project. At no point during this process did CTDEP object to the siting of this facility. Rather, they provided recommendations to the respective agencies with direct siting jurisdiction concerning construction timing, environmental studies to be conducted, and potential impacts. Moreover, the Commissioner of CTDEP (or his designee) sits as a voting member of the Connecticut Siting Council,¹⁶⁶ and his designee joined in all of the Council's Findings, Opinions, and Orders with respect to the Project. Based on the comments provided by CTDEP during this process, and CTDEP's participation in the Connecticut Siting Council process, one would conclude that the project is in fact approvable (Islander East notes that CTDEP's comments and the Connecticut Siting Council's ruling antedated the significant construction modifications developed by Islander East). For CTDEP to now claim that it has not been involved flies in the face of credibility and is contrary to the record.

- **CTDEP Offers No Evidence That Permanent Damage Will Result From Construction Of The Islander East Pipeline.**

In its initial brief, CTDEP states that Islander East is not advancing a national interest that is superior to other schemes to route gas and it is not proposing a project that is entitled to any priority, particularly in light of the long-term adverse impact of its proposed project on the

¹⁶⁵ *Id.* at 12.

¹⁶⁶ Conn. General Statutes §§ 16-50j(b)(1).

environment.¹⁶⁷ CTDEP's recurrent hand-wringing over "long-term" or permanent impacts is undercut by the analysis of The Garrett Group, L.L.C., which, like the Connecticut Siting Council, concluded that the bottom of the seafloor will recover and return to pre-project conditions.

CTDEP claims that the installation of the Iroquois pipeline, which was constructed in a different region of Long Island Sound using entirely different construction techniques than those proposed by Islander East, resulted in permanent impacts on the seafloor.¹⁶⁸ However, the CTDEP never cites any studies to support their claims of permanent impacts. In fact, the CTDEP recently issued a request for proposal to "determine what, if any, long-term negative environmental impacts have resulted from the installation of the Northeast Utilities cables, Iroquois pipeline and the two telecommunication cables (MCI and ATT) in the Connecticut portion of Long Island Sound."¹⁶⁹ The CTDEP's claims regarding permanent impacts are clearly based on anecdotal information, at best.

CTDEP states that 5.5 acres of nearshore habitat would be permanently altered and rendered unsuitable for commercial shellfishing because the cobble would interfere with harvesting techniques.¹⁷⁰ This is a misrepresentation of the actual effect of the backfill on the seafloor for the following two reasons.

First, Islander East's proposed backfill consists of gravelly coarse to fine sand backfill of the following composition:¹⁷¹

Islander East Project		
Islander East Proposed Backfill		
Sieve Designation (ASTM)	Sieve Opening	Percent Fine by Weight
2-inch	< 4.75 mm	100
No. 4	4.75 mm	30 – 80
No. 40	0.00425 mm	10 – 50
No. 200	0.075 mm	0 – 20

¹⁶⁷ CTDEP Brief at 32, 33.

¹⁶⁸ Islander East's Initial Memorandum at 47.

¹⁶⁹ CTDEP Request For Proposal. Investigations of Submerged Cables and Pipelines in the Connecticut portion of Long Island Sound at page 3 of 7.

¹⁷⁰ CTDEP Brief at 55.

¹⁷¹ Report on Engineered Backfill Study. Islander East Natural Gas Pipeline, Branford, Connecticut, Haley & Aldrich, May 2003.

Second, commercial shellfishing dredges weigh between 600 and 800 pounds and are typically on the order of 6-feet wide. The shellfish harvesting dredges have tines that protrude into the seafloor several inches,¹⁷² and high pressure water jets attached to the dredge direct water into the seafloor to loosen the sediments and facilitate removal of the shellfish. Thus, the assertion that the backfill material described in the table above would interfere with this commercial harvesting is an exaggeration.

VIII. OUTDATED & MISREPRESENTED AGENCY CORRESPONDENCE

CTDEP references several agency consultations.¹⁷³ Many of these references pertain to responses to Islander East's originally proposed offshore construction methods and are therefore outdated.

CTDEP indicates that the NMFS letter to NOAA dated June 4, 2003 supports CTDEP's conclusion that long-term adverse environmental impacts would be associated with the Islander East Project.¹⁷⁴ However, CTDEP did not say that the NMFS letter was based on Islander East's original construction methods, not the new modified construction methods that reduce impacts by over 90 percent in the nearshore environment. In addition, CTDEP failed to acknowledge that the NMFS recognized in its letter that its comments may not be germane since, at the time of the letter, Islander East was actively soliciting input from the CTDEP, Connecticut Department of Agriculture – Bureau of Aquaculture, EPA and U.S. Army Corps of Engineers on modified construction methods to minimize impacts.¹⁷⁵

CTDEP also references the EPA letter to FERC dated September 30, 2002 commenting on the final EIS.¹⁷⁶ The comments presented in this EPA letter are directed towards construction methods that are no longer pending before any agency and consequently are no longer relevant to the Islander East Project.

¹⁷² Connecticut Siting Council Evidentiary Hearings on April 17, 2002, at 143. Line 22.

¹⁷³ CTDEP Brief at 20, 39, 46, 47, 48, and 49.

¹⁷⁴ *Id.* at 20, 48.

¹⁷⁵ NMFS letter to NOAA, dated June 4, 2003 at 4.

¹⁷⁶ CTDEP Brief at 39.

CONCLUSION

Islander East has presented this technical information to refute the inaccurate statements contained in CTDE's final brief. As demonstrated in the previous sections, Islander East Pipeline Project

Is unique in that it will increase security and reliability by providing a separate independent crossing of Long Island Sound.

No other alternatives were identified that could meet the stated project purpose and need.

Does not cross through the center of the Thimble Shoar Shoals dependent facility.

Will not have long-term, negative consequences to nationally important, water dependent and coastal dependent use.

Will contain 100 percent of the drilling fluid during the reaming and swab passes during the HDD installation.

Completed detailed sediment testing and modeling support the conclusion that the impacts will be temporary; and

Has adequately scoped the project and conducted numerous studies to characterize the existing environment.

Accordingly, for all of the foregoing reasons and based on the entire Record in this matter, federal override of the state denial of consistency determination is warranted.

Dated December 12, 2000

UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

ISLANDER EAST PIPELINE COMPANY, L.L.C.

Appellant,

- vs -

STATE OF CONNECTICUT, DEPARTMENT OF
ENVIRONMENTAL PROTECTION ,

Respondent.

AFFIDAVIT OF
SERVICE BY
FEDERAL EXPRESS

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

MARIA I. MATOS, being duly sworn, deposes and says:

That I am not a party to the action, am over 18 years of age and reside in Westbury, New York.

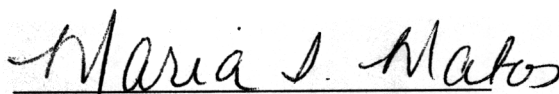
That on the 22nd day of December, 2003, I served an original and two copies of the

**APPEAL FROM A COASTAL ZONE MANAGEMENT PLAN OBJECTION
OF THE STATE OF CONNECTICUT, DEPARTMENT OF
ENVIRONMENTAL PROTECTION ("CTDEP"), TO THE
ISLANDER EAST PIPELINE PROJECT, REPLY TO THE CTDEP'S
INITIAL BRIEF IN OPPOSITION**

in the above-captioned matter on the attorneys named below at the addresses shown, by depositing true copies thereof, enclosed in a wrapper addressed as shown below, into the custody of Federal Express for overnight delivery, prior to the latest time designated by that service for overnight delivery, addressed to the following persons at the last known addresses as set forth below:

TO: Branden Blum, Esq.
U.S. Department of Commerce
National Oceanic & Atmospheric
Administration
1305 East-West Highway
Room 6111, SSMC-4
Silver Spring, MD 20910

David H. Wrinn, Esq.
Assistant Attorney General
Office of State of Connecticut Attorney General
55 Elm Street
Hartford, CT 06141-0120


Maria I. Matos

Sworn to before me this
22nd day of December, 2003


Notary Public

NANCY STURSBURG
Notary Public, State of New York
No: 01ST5063709
Qualified in Suffolk County
Commission Expires July 29, 20 06